Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CRANE VESSEL TITAN 5, *in rem*, and its claimant, FAR EASTERN MARINE EXPLORATION DRILLING COMPANY,

Petitioner,

v.

OIL SERVICES AND TRADING, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was in error in affirming the District Court holding that by permitting its vessel to enter into commercial service, a foreign state not only waived its immunity from the jurisdiction of the courts, as provided by 28 U.S.C. §1605(b), but also waived its immunity from pre-judgment or attachment of the vessel, without the explicit waiver required by 28 U.S.C. §1610(d)(1) of the Foreign Sovereign Immunities Act.
2. Whether the District Court's *de facto* seizure of the vessel by virtue of an order prohibiting movement of the vessel is from June 10, 1995 until September 25, 1995, and the actual seizure ordered on that date, without any hearing, all in violation of Federal Admiralty Rule E(4)(f) (requiring an immediate hearing after an arrest), amount to such a fundamental denial of due process as to entitle Petitioner to release of the vessel.

PARTIES TO THESE PROCEEDINGS

The Rule 29.6 listing of parent companies and non-wholly owned subsidiaries is as follows:

Petitioner

Far Eastern Marine Exploration Drilling Company ("FEMCO").

FEMCO's parent company is Sakhalinmorneftegaz of Okha, Sakhalin, in the Russian Federation.

Sakhalinmorneftegaz is itself principally owned by Rosneft, the Oil and Energy Department of the Russian Federation.

Respondents

Entron, Ltd. and Entron Offshore (A.P.) PTE, Ltd.;the parent company, of Entron, Ltd. and of Entron Offshore (A.P.) PTE, Ltd. is Technalink.

The remaining of respondents have no parent companies or non-wholly owned subsidiaries known to Petitioners.

Oil Services and Trading Company, Inc.

L&L Oil Company, Inc.

Versabar, Inc.

Seabulk Offshore, Inc.

Bridon Elm, Inc.

Coral Marine Services, Inc.

King Trucking, Inc.

Continental Machine Company, Inc.

Tri-Gas, Inc.

Double Eagle Marine, Inc.

Inland Marine Service, Inc.

The following, while not parties to the original proceedings in the district court or in the Fifth Circuit, have recently intervened in the district court to file liens, and have an interest in the outcome:

Geomatic B.V. Engineering & Consultancy (Geomatic)
Brown & Root, Inc. - It is understood that The Halliburton Company is the parent company of Brown & Root, Inc.
Ocean Marine Contractors, Inc.
Kosta Maritime, Inc.
Taylor Industrial Specialties, Inc.
Shannon Hardware Co., Ltd.
Associated Welding Supply, Inc.
Central Boat Rentals, Inc.
Patterson Marine, Inc.

The following, while named as a defendant in the district court, was apparently never served with process, has not filed an appearance, and is unrepresented:

Sakhalin Offshore Contractors, Ltd.

While the exact corporate relationships are unknown to Petitioners, Sakhalin Offshore Contractors, Ltd., is believed to be related to the following, none of whom have been named as a party or made any appearance:

Glenmore Heavy Lifting, Inc. - Charterer of the TITAN 5
Glenmore Offshore Contractors, Inc.
Glenway Americas, Inc.

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NO.

IN THE
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CRANE VESSEL TITAN 5, *in rem.* and its claimant, FAR EASTERN MARINE EXPLORATION DRILLING COMPANY

Petitioner

VS.

OIL SERVICES AND TRADING, INC., et al

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Far Eastern Marine Exploration Drilling Company ("FEMCO") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on October 26, 1995, which approved the pre-judgment seizure of a vessel owned by the Russian Federation (a foreign state) despite the prohibition against pre-judgment seizure found in the Foreign Sovereign Immunities Act, 28 U.S.C. §1609-1610.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is cited as an unreported decision at 70 F.3d 1269. It is reprinted in the Appendix hereto, p. 1a *infra.*

The decision of the United States District Court for the Western District of Louisiana (Haik, D.J.) has not been reported. It is reprinted in the Appendix hereto, p. 4a *infra.*

JURISDICTION

The original petition in the District Court was within the Admiralty and Maritime Jurisdiction of that court, being a claim to enforce a maritime lien on the vessel TITAN 5. While the Foreign Sovereign Immunities Act withholds the District Court's jurisdiction over a "foreign state," FEMCO, a "foreign state" as defined by 28 U.S.C. §1603, has never denied that its vessel was engaged in commercial service in the United States, thus bringing this claim within the exception to a foreign state's jurisdictional immunity found in 28 U.S.C. §1605(b).

On petitioner's appeal and applications for writs to the United States Court of Appeals for the Fifth Circuit, the Fifth Circuit found appellate jurisdiction under the collateral order doctrine based upon the district court's denial of FEMCO's Motion to Dismiss pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §1602-11. On October 26, 1995, the Fifth Circuit denied FEMCO's appeals, petitions for mandamus and motions. FEMCO's Petition for Rehearing and Suggestion for Rehearing *en banc* were denied by the Fifth Circuit on November 29, 1995. Appendix, p. 12a.

On February 16, 1996, Justice Scalia ordered that the time for filing this petition for writ of certiorari be extended to and including March 28, 1996. Appendix, p. 14a.

The jurisdiction of this court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254 (1), and pursuant to the Courts inherent powers.

STATUTE INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. §1602-1611, is reproduced in full in the Appendix, p.15a. Admiralty Rule E is reproduced in the Appendix, p. 27a.

STATEMENT OF THE CASE

A. BACKGROUND

FEMCO presented to the district court an affidavit[1], internal documents of Rosneft[2] and newspaper articles[3] demonstrating FEMCO's status as a "foreign state" under the Foreign Sovereign Immunities Act (FSIA)[4] and FEMCO's

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[1]Minutes of Witness Interrogation - I. Chernov, Appendix p. 28a.

[2]Statement of I. Letchinez, Appendix p.30a.

[3]See Reuter's article reported on LEXIS reporting that state-run Rosneft owns a 51% share of Sakhalinmorneftegaz. Appendix p. 31a.

[4]Subsection (a) of Section 1603 of FSIA provides that a foreign state as used in this chapter includes an agency or instrumentality of a foreign state. A "agency or instrumentality of a foreign state" includes "...an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision...". 28 U.S.C. §1603(b)(2). *See also Wilk v. Creditanstalt Bankverien International*, 1993 U.S. Dist. LEXIS 3961 (S.O.N.Y. March 31, 1993) (holding that a corporation, a majority of whose voting stock is owned by the Republic of Austria was a "foreign state" within the meaning of the FSIA).

ownership of the TITAN 5[5]. No contrary evidence was presented by respondents. The district court and the Fifth Circuit implicitly assumed for the purposes of their decisions, that FEMCO was a "foreign state".

Prior to 1993 the property and assets of the Far Eastern Marine Exploration and Drilling Company ("FEMCO") and its parent company Sakhalinmorneftegaz[6] were owned by Rosneft, a part of the State Ministry of Fuel and Energy of the Union of Soviet Socialist Republics ("USSR"). Following the partial breakup of the USSR, the Russian Federation succeeded to these properties. In compliance with President Yeltsin's privatization order, Sakhalinmorneftegaz became a joint stock company. Appendix p. 33a.

A portion of the company's stock was issued by decree to S E Rosneft (State Enterprise Rosneft) which is a part of the present Ministry of Fuel and Energy of the Russian Federation. Rosneft owns a majority of the voting stock of Sakhalinmorneftegaz[7]. The Crane Vessel TITAN 5 was originally built for the Soviet Navy and was some years later transferred to the Department of Fuel and Energy. The vessel was then assigned to the Sakhalin Division which, after privatization, became Sakhalinmorneftegaz. FEMCO was formed as a subsidiary of Sakhalinmorneftegaz to handle over water exploratory drilling. Various assets were transferred to

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[5]Harbour Master Certificate dated July 12, 1995. Appendix 32a.

[6]Literally, Sakhalin Oil and Gas Company.

[7]Minutes of Witness Interrogation - I. Chernov, Appendix, p.29a.

FEMCO, including the TITAN 5. FEMCO is wholly owed by Sakhalinmorneftegaz.

Sakhalinmorneftegaz, on behalf of FEMCO placed the TITAN 5 into foreign commercial service and chartered the vessel to a company named Glenmore Heavy Lifting, Ltd. ("Glenmore"). Glenmore established operations in the United States directed towards, among other things, removing abandoned oil platforms in the Gulf of Mexico. The TITAN 5 was moved to the United States and put into service. However, the vessel proved ineffective in this work because it could not operate in the relatively heavy seas in the Gulf of Mexico.

FEMCO's entrance into the free market economy has proved disastrous. Glenmore Heavy Lifting, Ltd. never paid any charter hire to FEMCO. In addition, certain companies which are believed to be related to Glenmore Heavy Lifting, Ltd. ordered labor, services, supplies and equipment for which, apparently, they were unable or unwilling to pay. FEMCO canceled the charter of the TITAN 5 on June 9, 1995 for non-payment of charter hire. The various Glenmore Companies have closed their doors, the principals have fled, and the lien claimants, remaining unpaid, seek to assert maritime liens against the TITAN 5.

In attempts to put the vessel to work, certain devices, including a four point system of mooring winches, were placed on the vessel, and various materials and labor were apparently ordered for this purpose. These items were ordered, in part, by Sakhalin Offshore Contractors, Ltd. and/or Glenmore Offshore Contractors Ltd. and/or Glenway Americas, none of which were the charterer of the vessel. FEMCO never authorized these companies to impose liens on TITAN 5. Nonetheless,

these unpaid suppliers of labor, materials, supplies, services and equipment have sought to bring liens against the TITAN 5.

The claims to date exceed $1,000,000.00, with more interventions being filed weekly.

B. PROCEDURAL HISTORY

Entron, Ltd. and Entron Offshore (A.P.) P.T.E., Ltd. (collectively "Entron") filed their Complaint against the TITAN 5 and Sakhalin Offshore Contractors, Ltd. (incorrectly alleged to be the owner/operator of the TITAN 5) on March 15, 1995, invoking the admiralty and maritime jurisdiction of the district court pursuant to 28 U.S.C. 1331. The TITAN 5 was arrested on April 4, 1995 , but then was voluntarily released on April 7, 1995. Appendix, p.42a.

Oil Services and Trading, Inc. ("OSTI"), one of the other respondents, filed its intervention and a motion for the re-arrest of the vessel, which was set for hearing on June 14, 1995. Appendix p.43a. On that date, after hearing certain information that the TITAN 5 was 51% owned by the Russian Federation (Appendix p. 47-48a), District Judge Haik of the Western District of Louisiana postponed the hearing on the Motion to Arrest the vessel until July 18, 1995, but issued an order on June 14, 1995, prohibiting the vessel from moving, prohibiting the crewmembers from participating in moving the vessel and ordering that notice be given to the Coast Guard so that the vessel could not be cleared to depart from the United States. Appendix, p.53a. This order was issued without a formal request by OSTI, without a bond, without FEMCO's knowledge or presence,[8] but with Respondent's knowledge that

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[8]FEMCO and Sakhalinmorneftegaz are located in Okha, Sakhalin Island, the center of a major and devastating earthquake on May 28, 1995 -

the TITAN 5 was likely 51% owned by the government of the Russian Federation.

One Freddie Frederickson was present at the hearing, apparently representing the charterer or its affiliated companies (Appendix p. 46a-47a); the charter had, however, been canceled on June 9, 1995.

Present counsel representing FEMCO and the TITAN 5 were retained on or about July 12, 1995 and immediately moved for, and were granted, a two week postponement of the hearing scheduled for July 18, 1995. At the same time counsel filed a suggestion of sovereign immunity and set about obtaining proof of the governmental ownership of the TITAN 5.

On July 28, 1995, FEMCO filed its opposition to the motion to arrest, including documents proving government ownership of the TITAN 5. On August 1, 1995, on the eve of the hearing, Judge Haik postponed the hearing until October 12, 1995, thereby keeping the vessel under *de facto* seizure for an added two months by virtue of his June 14, 1995 order that the vessel not be moved and that the Coast Guard be given notice. Appendix p. 55a. FEMCO's hearing on its motion to vacate the Judge's Order of June 14, 1995, was continued until October 12, 1995.[9] Immediately after receiving the August 1,

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just days before the hearing. Neither FEMCO nor Sakhalinmorneftegaz had notice of the hearing, nor was either present on June 14, 1995. The Russian Captain of the TITAN 5 was summoned from the vessel to appear at the hearing.

[9]Local Rule 2.07W of the Western District of Louisiana requires that the opposition to a motion be filed within fifteen days of service of the motion. The motion was never served on FEMCO as provided by 28 U.S.C. §1605.

1995 order, FEMCO moved to set for an immediate hearing its Motion to Vacate the June 14, 1995 Order. This motion was denied by the court on August 9, 1995. Appendix p.56a.

Counsel for FEMCO and the TITAN 5 repeatedly urged during a September 21, 1995, phone conference with the Judge that a hearing be granted if an arrest was to be ordered. Despite such request, Judge Haik stated that FEMCO and the TITAN 5 would not be granted a hearing until October 12, 1995, 17 days after the proposed order of arrest was issued. Appendix p. 68a. Judge Haik then indicated, in a September 25, 1995 conference call, that it would not be necessary for FEMCO and the TITAN 5 to have a hearing even on October 12, 1995. Appendix, p. 70a.

On September 25, 1995, the judge vacated the "de facto" arrest order, but simultaneously granted OSTI's Motion to Re-Arrest the Vessel and for a Substitute Custodian. The judge further denied the motions by FEMCO and TITAN 5 to dismiss the complaints of OSTI and other maritime lien claimants for insufficient service of process. Appendix p.78a.

FEMCO and the TITAN 5 filed their Notice of Appeal (now No. 95-30986 in the Fifth Circuit Court) from the portion of those orders arresting the TITAN 5, appointing a substitute custodian and requiring the movement of the TITAN 5 on the same date. FEMCO and TITAN 5 then filed an additional Emergency Motion to vacate or stay the orders on September 29, 1995, and also filed with the Fifth Circuit petition for writs on October 2, 1995.[10] By this time TITAN 5 had been under *de facto* seizure for 104 days, with no hearing and no evidence of

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[10]While believing that the District Judge's Orders were appealable, writs were filed out of abundance of caution.

authority to impose liens on the TITAN 5 by those who ordered the materials and services which form the basis of the lien claims.

On October 3, 1995, the Fifth Circuit Court of Appeal issued an order which denied appellants' writs of mandamus and emergency motions in No. 95-30908, 95-30993 and 95-30826, but remanded the case to the district court for further proceedings and to make findings of fact and conclusions of law concerning the following issues:

1. Whether the TITAN 5 is immune from pre-judgment seizure under the Foreign Sovereign Immunities Act.
2. The applicability of and compliance with the notice and valuation provisions contained in 28 U.S.C. §1605(b-c).
3. The legal significance with regard to notice and the opportunity for hearing of the presence of the TITAN 5's Russian speaking captain at the hearing held on June 14th.

Appendix p. 79a-80a.

The Fifth Circuit Order directed the district court's attention to Supplemental Admiralty Rule E(4)(f) which requires a district court to hold a prompt post-seizure hearing at which the seizing party must demonstrate the validity of its lien claim.

On October 5, 1995, the district judge issued written reasons for its prior orders in an attempt at compliance with this court's October 3, 1995 mandate. Appendix p. 4a. No hearing was held and no evidence was taken. The district court declined to hold a hearing on October 12, 1995 or at any other

time, as it had already reached a conclusion on the law with respect to the claim of sovereign immunity by FEMCO and the TITAN 5. The district court, relying upon §1605(b), held that because TITAN 5 was engaged in 'commercial service', it could be arrested prior to any judgment being entered against the vessel.

FEMCO, believing that section 1609 of FSIA prohibits the prejudgment arrest of the vessel of a foreign state, even if engaged in commercial service, again appealed, petitioned for writs and asserted its emergency motion. The Fifth Circuit issued its ruling on October 26, 1995, affirming the decision of the District Court. Appendix, p. 1a-3a. In particular, the Fifth Circuit found that:

> 28 U.S.C. §1605(b) specifically contemplates suits *in rem* to enforce maritime liens against a foreign vessel engaged in commercial activity. This more specific language overrides the general provision of 28 U.S.C. §1609-10. See *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973).

The above quoted sentences represent the only stated reasons for the Fifth Circuit's decision to uphold the pre-judgment arrest of a foreign owned vessel. In so ruling, the Fifth Circuit ignored the plain text of FSIA, the legislative history of the FSIA, and a contrary Fifth Circuit decision issued only one year earlier. *Mangattu v. M/V IBN HAYYAN*, 35 F.3d 205 (5th Cir. 1994) *reg'h denied*, 1994 U.S. App. LEXIS 37191 (1994).

The TITAN 5 was released from seizure on February 28, 1996 (Appendix p. 81a), after FEMCO posted $1,500,000 in security pursuant to the terms of an Escrow Agreement. Appendix p. 82a; Amendment No. 1 to Escrow Agreement. Appendix p. 95a.

FEMCO submits that because the seizure was improper it is entitled to the return of its security.

REASONS FOR GRANTING WRITS

I.

The district court's order ignored the plain terms of Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA") and the clear legislative intent of Congress in adopting FSIA, and departed from the accepted and usual course of proceedings, when it ordered the prejudgment arrest of the TITAN 5. The Fifth Circuit's approval of this erratic and inconsistent procedure calls for the exercise of this court's power of supervision in order to avoid frustrating the clearly expressed intent of Congress and to avoid international incidents which could embarrass the foreign policy of the United States.

A. The Foreign Sovereign Immunity Act

There was a clear intent of Congress in adopting FSIA, and of the Executive Branch as represented by Department of State representatives who testified before Congress, to bring order out of the pre-existing chaos surrounding foreign sovereign immunity claims and disputes. The intent was that:

(1) Sovereign immunity disputes should be settled by the courts on clearly established principles, as is done in most other countries, and not by the Department of State, pursuant to the prior United States practice

(2) Foreign states and their property and vessels would not be immune from the jurisdiction of the courts if they engaged in commercial activities in the United States

(3) A system of service and notice was established

(4) Prejudgment seizure or attachment of a foreign state's property was prohibited unless the foreign state explicitly waived such immunity.

(5) Subject to the prohibition in paragraph four, once service and notice was accomplished, an action against the vessel of a foreign state proceeds as if it were an *in rem* proceeding.

This intent was clearly set out in the testimony of State Department representative Monroe Leigh who testified before Congress (hearings before the Subcommittee on Administrative Law and Government Relations on H.R. 11315, June 2, 1976); in several law review articles[11] and has been reviewed in several cases. *Jetline Services, Inc. v. M/V MARSA EL HARIGA*, 462 F. Supp. 1165, 1174(D. MD. 1978); *Cargill International v. M/T PAVEL DYBENKO*, 991 F. 2d 1012, 1016 (2nd Cir. 1993).

The FSIA, in ten articles, does just what Congress and the State Department set out to do:

1. Section 1602 requires that claims of foreign states to immunity be determined by United States courts.

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[11]A.N. Yiannopoulos, *Foreign Sovereign Immunity and the arrest of state owned ships: The need for an Admiralty Foreign Sovereign Immunity Act*, 57 Tul.L.Rev.1274(1983); Hanson, *The Foreign Sovereign Immunities Act: The use of prejudgment attachment to ensure satisfaction of anticipated judgments*, Northwestern Journal of International Law and Business, 2:517(1980).

2. Section 1605(a)(2) provides that foreign states shall not be immune from the jurisdiction of the courts if the action brought against it is based upon a commercial activity of the foreign state carried on in the United States.

3. Sections 1605 and 1608 provide a system of service upon a foreign state and a manner of giving proper notice.

4. Sections 1609 and 1610 provide that the property of a foreign state shall be immune from pre-judgment seizure or attachment, even when used in connection with commercial activity in the United States, unless the foreign state has explicitly waived its immunity.

5. Section 1605(c) provides that where a vessel of a foreign state is involved after proper notice is given, suit shall otherwise proceed as if it were an *in rem* proceeding.

Until this case, the Courts have been virtually unanimous in following this straightforward formula both before and after the 1988 amendments. *Mangattu v. IBN HAYYAN* 35 F.3d 205, (5th Cir. 1994), *Borgships, Inc. v. the M/V MACARENA*, 1993 U.S. Dist. Lexis 9950 (E.D. La. July 16, 1993); *Cargill Int'l v. M/T PAVEL DYBENKO*, 1992 U.S. Dist. LEXIS 2329 (S.D.N.Y. Feb. 27, 1992) *rev'd on other grounds*, 991 F.2d 1012 (2d Cir. 1993); *China National Chemical Import and Export Corp. v. M/V Lago Hualaihue*, 504 F.Supp. 684 (D. Md. 1981); *Isbrandtsen Marine Services, Inc. v. Shanghai Hai Xing Shipping Co., Ltd.*, 1991 U.S. Dist. LEXIS 14644 (D.Ore. April 1, 1991); *Jetline Services, Inc. v. M/V MARSA EL HARIGA*, 462 F.Supp. 1165, (D.Md. 1978);

O'Connell Machinery Company, Inc. v. M/V Americana, 566 F.Supp. 1381 (S.D. N.Y. 1983) *aff'd 734 F.2d 115* (2d Cir. 1984). *But see Shell Oil v. M/V Itanage*, 830 F.Supp. 1423 (N.D. Fla. 1993). The statute's interpretation has rarely gotten to the Court of Appeals, and never to this Court.

B. Errors in the Present Case

The decision in this case is in error because:

(1) In its perhaps understandable zeal to protect local merchants and service providers, the district court ordered, and the Fifth Circuit approved, the very pre-judgment seizure which the FSIA (§1609-1610) prohibits.

(2) The district court confused, and the Fifth Circuit sanctioned, the claimed right of pre-judgment attachment, specifically prohibited by §1609-10, with the exercise of the court's jurisdiction, because of the commercial activities of the vessel while under charter, pursuant to §1605(b).

Section 1609 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted October 21, 1976] property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in Section 1610 and 1611 of this chapter.

Section 1610 provides, in pertinent part:

> (d) the property of a foreign state, as defined in Section 1603(a) of this chapter, used for commercial activity on the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in the courts of the United States or of a State, or prior to the elapse of the period of time provided in Subsection (c) of this section, if -

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment... and
(2) the purpose of the attachment is to secure satisfaction of a judgment...

Read together, these sections clearly show that prejudgment attachment or arrest of the property of a foreign state (even were the foreign state is engaged in commercial activity), is prohibited except where the foreign state has explicitly waived its immunity by virtue of a treaty or otherwise *and* the prejudgment seizure is used for the purpose of securing a judgment.

Because the Fifth Circuit's holding is at such variance with the virtually uniform practice of the courts of the United States, and because the Fifth Circuit opinion is likely to influence other courts[12], this court should exercise its supervisory powers to correct this error.

II.

The Fifth Circuit's decision that engaging in commercial service operates as a waiver of the prohibition against prejudgment seizure contained in 28 U.S.C. §1610 raises an important question of Federal Law pertaining to the United States Foreign Policy which has not been, but should be, settled by this Court.

A major purpose of enacting the Foreign Sovereign Immunities Act was to avoid friction in international relations. The United States Congress, in enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §1602-11, sought "to facilitate and depoliticize litigation against foreign states and minimize

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[12]There is now pending in *SHRM Catering Services v. The TITAN 2*, No. B-95-61, U.S. Dist. S.D. TX, a similar question concerning a Ukranian vessel. The Court is bound by Fifth Circuit precedent.

irritations in foreign relations arising out of such litigation." Hearings on H.R. 11315 before the Subcommittee on Administrative Law in Government Relations of the House Committee on the Judiciary, 94th Cong. 2d Sess. 29 (1976) reprinted in 1976 U.S.C.C.A.N. 6604, 6631 [hereinafter cited as "House Report"]. *See also Cargill Int'l v. M/T PAVEL DYBENKO*, 991 F.2d 1012, 1016 (2d Cir. 1993) and A.N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 Tul.L.Rev. 1274, 1275 (1983) The declared purpose of the act when finally enacted in 1976 was to enable the United States courts to adjudicate "the claims of foreign states to immunity from the jurisdiction of such courts [which] would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. 1602.

The international character of shipping and the maritime industry has made pre-judgment arrests of vessels owned by a foreign state one of the more long standing and frequent applications of the foreign sovereign immunity doctrine. As stated by Professor Yiannopoulos:

> Whether under compulsion from public international law, internal law or both, ships of foreign sovereigns traditionally have been accorded certain immunities. Ships are property, though of a special kind, and have enjoyed the immunity from arrest and execution that is accorded to the property of a foreign sovereign.

57 Tul.L.Rev. at 1275, 1276.

In 1812, the United States Supreme Court considered the propriety of arresting a vessel of Napoleon's Navy in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 135 (1812). This Court announced the doctrine of foreign

sovereign immunity for ships of war of a friendly nation. The principal of sovereign immunity was extended to lien claims for supplies furnished to foreign vessels not long thereafter. *See The Pizarro v. Matthias*, 19 F.Cas. 786 (S.D.N.Y. 1852) (No. 11,199); *Walley v. Schooner Liberty*, 12 La. 98 (1838). In the twentieth century, sovereign immunity was extended to commercial vessels operated by a foreign state. The United States Supreme Court in *Berizzi Bros. Co. v. S/S PEASRO*, 271 U.S. 562 (1926) held that commercial ships "must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose." Courts confronted with the arrest of a foreign vessel in later years routinely deferred to the State Department in order to avoid friction with friendly nations. *See Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943).

As the doctrine of sovereign immunity developed, United States policy became clear that vessels engaged in commercial activity were entitled to a restrictive, but not absolute immunity. The Foreign Sovereign Immunities Act codified the doctrine of restrictive immunity. *See Jet Line Services*, 462 F.Supp. at 1170. Consistent with this restrictive theory, section 1605(b) of FSIA allows an action to enforce a maritime lien based on the commercial activity of the foreign state, but limits the claimant to an *in personam* action, while decreeing that *in rem* procedures will be followed; all subject to the prohibition against prejudgment arrest set forth in 28 U.S.C. 1609-10. *See Cargill Int'l v. M/T PAVEL DYBENKO*, 1992 U.S. Dist. LEXIS 2329 (S.D.N.Y. Feb. 27, 1992) *rev'd on other grounds*, 991 F.2d 1012 (2d Cir. 1993), Slip. op. at 5 ("Section 1605(b) of the FSIA provides a substitute for the usual *in rem* proceeding utilized to enforce a maritime lien... ").

Isbrandtsen Marine Services, Inc. v. Shanghai Hai Xing Shipping Co., Ltd., 1991 U.S. Dist. LEXIS 14644 (D.Ore. April 1, 1991). The Court in *Isbrandtsen*, found that:

> When a vessel is owned by a foreign state (as here), the FSIA substitutes an *in personam* claim against the owner of the vessel for the *in rem* claim against the vessel. Instead of arresting the vessel, the lien claimant enforces his maritime lien and gives notice of the suit through delivery of a copy of the summons and complaint to the person having possession of the vessel or cargo against which the lien is asserted. Then, the action proceeds as if it were an action *in rem* against a privately owned vessel.

Isbrandtsen, p. 2. (citation omitted).

One of the fundamental principals of sovereign immunity from its origins and continuing through to the most recent amendments of FSIA, is that property of a foreign state is immune from pre-judgment arrest. *Jetline Services, Inc. v. M/V MARSA EL HARIGA*, 462 F.Supp. 1165, 1174 (D.Md. 1978); *Borgships, Inc. v. the M/V MACARENA*, 1993 U.S. Dist. Lexis 9950 (E.D. La. July 16, 1993) ("There is no dispute that the FSIA is an absolute bar to the pre-judgment attachment of the property of a foreign state, including a vessel subject to a maritime lien.")

The TITAN 5 was admittedly engaged in a commercial activity on behalf of an instrumentality of the Russian Federation. FEMCO and the TITAN 5 do not seek absolute immunity here nor have they pursued such immunity in the courts below. Petitioners *do* seek to invalidate the pre-

judgment arrest of the TITAN 5 as is explicitly provided for in Section 1609 of the FSIA.

The arrest of this foreign-owned vessel and the substantial costs associated with litigating the vessel's immunity has irritated various instrumentalities of the Russian Federation, a result which the FSIA was specifically meant to prevent.[13] The FSIA represents a delicate balance between the rights of lien claimants and the U.S. policy of protecting property of a foreign state prior to entry of a judgment. The Fifth Circuit's decision creates a dangerous and disruptive precedent for future courts to follow in this and other circuits.[14]

As discussed *infra*, the Fifth Circuit's decision is contrary in principle to a prior Fifth Circuit decision and, with one exception, stands alone among courts which have considered the issue before or after the 1988 amendments. *Compare Borgships*, slip op. at 3, *Cargill*, p. 5; *Isbrandtsen*, p. 2 and *Silver Star Enterprises v. SARAMACCA M/V*, 1994 U.S. Dist. LEXIS 16939, p. 1-2 (E.D. La. Nov. 22, 1994), with *Shell Oil v. M/V ITANAGE*, 830 F.Supp. 1423 (N.D. Fla. 1993). A decision by the United States Supreme Court would provide much needed guidance for the numerous courts which will be faced in the future with the pre-judgment arrest of vessels owned by foreign states. Consideration by the Supreme Court will further settle an important question of federal law

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[13] In hearings before the House Subcommittee for Administrative Law in Government Regulations, it was noted that the FSIA was intended to eliminate the diplomatic irritations that sometimes arose when a pre-judgment arrest was made.

[14] See footnote 12 *supra*, identifying a pending case.

pertaining to the United States relationship with foreign nations.

III.

The Fifth Circuit failed to consider its prior decision in the case of *Mangattu v. IBN HAYYAN* 35 F.3d 205, (1994) on the same issue.

A little over a year ago, a different panel of the Fifth Circuit was faced with an argument very similar to the one now asserted by respondents. See *Mangattu v. M/V IBN HAYYAN*, 35 F.3d 205, 209 (5th Cir. 1994). The appellants in *Mangattu* relied upon Section 1605 for the proposition that once the foreign state engaged in commercial activity, it lost all benefit of FSIA immunity and was subject to all remedies that were available against any defendant. *Id.* The Fifth Circuit rejected this contention, stating:

> [T]he issue of attachment is governed by Section 1609, which provides, 'the property in the United States of a foreign state shall be immune from attachment, arrest and execution, except as provided in Section 1610 and 1611 of this chapter.' The plain words of the statute clearly preclude reading the language of Section 1605 and 1606 to control the issue in this case.

35 F.3d at 209 (footnotes omitted).[15]

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[15] The court in *Mangattu* went on to say that under Section 1610(d)(1) a seizure is not prohibited if the purpose of attachment is to secure satisfaction of a judgment and not to gain jurisdiction. This is incorrect. The *Mangattu* panel apparently overlooked, because not relevant to that decision, the conjunctive 'and' of Section 1610(d). The section when read together with both subparts provides that an exception to the immunity from arrest has provided in Section 1609 occurs when the

Both *Mangattu* and the present case involved prejudgment *in rem* seizures of a vessel. The only distinction is that the "attachment" in *Mangattu* was under Supplemental Admiralty Rule B, while the "arrest" in the present matter was effected under Rule C. The distinction is irrelevant since under Section 1609, both attachment *and* arrest are prohibited, subject to certain exceptions found in sections 1610 and 1611 of the FSIA.[16]

Both the *Mangattu* panel and the Fifth Circuit panel decision in the present case were faced with facially conflicting provisions in Sections 1605 and 1609. However, the *Mangattu* panel perceived that the more specific provision was Section 1609, since it specifically referred to arrests and attachments, while Section 1605 did not. The panel in this case found the more specific provision to be Section 1605 since it specifically dealt with maritime lien claims. This interpretation runs directly counter to the history and purpose of sovereign immunity and to the legislative and jurisprudential history of the Foreign Sovereign Immunity Act.

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purpose of the attachment is both to secure satisfaction of a judgment *and* when the foreign state has explicitly waived its immunity. Neither of the two prerequisites for this exception have been proved or even alleged here.

[16]Sections 1610 and 1611 are not at issue here since respondents do not contend that either FEMCO or the Russian Federation has explicitly waived its immunity from attachment prior to judgment (see Section 1610(d)(1)). Petitioner does not contend that its property is protected by Section 1611 relating to property of a military character, central bank or defense agency.

IV.

The Fifth Circuit in the present case seriously misapprehended the effect of the 1988 amendments to the Foreign Sovereign Immunities Act.

The legislative history of Section 1605(b) as originally enacted reveals that:

> The purpose of this subsection is [to] permit a plaintiff to bring suit in a U.S. District Court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an *in personam* action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf 46 U.S.C. §741 *et seq.* In view of Section 1609 of the bill, Section 1605(b) is designed to avoid arrest of vessel or cargo of a foreign state to commence a suit.

U.S.Code Cong. and Admin. News, p. 6620 (1976); *see also Hanson, The Foreign Sovereign Immunities Act: The Use of Prejudgment Attachment to Insure Satisfaction of Anticipated Judgments*, Northwest Journal of International Law and Business, 2:517 (1980).

This procedure was understood and consistently followed by the courts. See *e.g. O'Connell Machinery Company, Inc. v. M/V Americana*, 566 F.Supp. 1381 (S.D. N.Y. 1983) *aff'd 734 F.2d 115*, (2d Cir. 1984); *Jetline Services, Inc. v. M/V MARSA EL HARIGA*, 462 F.Supp. 1165 (D. Md. 1978); *China National Chemical Import and Export Corp. v. M/V Lago Hualaihue*, 504 F.Supp. 684 (D. Md. 1981).

The problem under the old Section 1605 (b) was that when a plaintiff mistakenly arrested the vessel of a foreign

state, he would lose both his *in rem* and *in personam* rights against the owner, if the court found that the plaintiff knew or should have known of the vessel's immune status. See *Jetline supra*, and House Report at 149-151. Making such a determination is not always easy.[17] The 1988 Amendments eliminated this potential pitfall for maritime lien claimants and maritime practitioners. The legislative history of the amendment provides:

> A H.R.1149 [the 1988 amendment to FSIA] would substitute the award of damages for losses resulting from the wrongful arrest of a vessel owned by a foreign state, instead of barring the entire claim and would allow the claim to proceed under *in personam* jurisdiction, pursuant to the FSIA. H.R. 1149 makes it clear that a case brought under Section 1605(b) to enforce a maritime lien will proceed under the established maritime law principles of *in rem* suits, even though it is a suit *in personam*.

1988 U.S. Code Cong. and Admin. News, 4511, 4512.

Thus, while the penalty for noncompliance with the statute has been moderated, the amended act maintains the policy objective of preventing the prejudgment arrest of vessels owned by a foreign state by awarding damages to the vessel owner.

William R. Dorsey, III of the Maritime Law Association, in his testimony before the House Committee

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[17]It would be virtually impossible for a local vessel supplier to discover the relationship between FEMCO and the Russian Federation, as disclosed in the various documents and statements. See footnotes 1, 2, 3 and 5.

summarized the effects of the proposed amendments as follows:

> (1) It would change the effect of an improper arrest of a vessel under the FSIA,
>
> (2) It would permit foreclosure of preferred ship mortgages in accordance with the Ship Mortgage Act of 1920, which at present is not possible with respect to a state-owned vessel as defined in the FSIA, and
>
> (3) It would make clear that the nature of any action under Section 1605(b) of the FSIA, which was intended to be a substitute for maritime *in rem* claims would proceed and be conducted as if they were *in rem* claims *except for permitting arrest of the vessel.*

(emphasis added). Statement of the Maritime Law Association of The United States before the House Judiciary Committee on Administrative Law and Government Relations on Proposed Amendments to the Foreign Sovereign Immunities Act (HR4592 and HR3137) (May 20, 1986).

A further, and most revealing, bit of legislative history is helpful. An additional amendment to the FSIA was proposed in 1988 by the Committee on the Judiciary and supported by the State Department but rejected by Congress. This amendment to FSIA would have allowed pre-judgment seizure for the purpose of securing satisfaction of a judgment. The proposed amendment would have added the following provision as Section 1610(d):

> In addition to subsection (c), any property in the United States of an agency or instrumentality of

> a foreign state engaged in a commercial activity in the United States shall not be immune from attachment or injunctive relief before the entry of a judgment in any action brought in a court of the United States or of the state, or before the time provided in subsection (b) of this Section expires, if--
>
> . . .
>
> (B) the purpose of the attachment or injunction is to secure satisfaction of a judgment or an arbitral award has been or may be entered against the agency or instrumentality and not to obtain jurisdiction.

House Report, 100-824 to accompany H.R. 3763, August 5, 1988. The rejection by Congress of the proposed amendment, which would have specifically allowed a prejudgment arrest for the purpose of securing a future judgment (the typical Rule C seizure) further illustrates the decision by Congress that no such prejudgment arrest is contemplated by the FSIA, even to enforce a maritime lien, absent an explicit waiver.

With the exception of *Shell, supra*, every court which has considered Section 1605(b) since the 1988 amendments, have concluded that a vessel owned by a foreign state remains immune from prejudgment arrest or attachment. *Mangattu,* 35 F.3d at 209-210; *Cargill, supra.*, at p. 5; *Isbrandtsen, supra.*, p. 2; *Silver Star Enterprises, supra.* p.1-2 and *Borgships, supra.*, at 3. The Fifth Circuit, by failing to consider the history and purpose of the act, its prior decision in *Mangattu*, or the legislative history of the FSIA, misapprehended the effect of the 1988 amendments.

V.

The District Court's Restraint of TITAN 5's Movement Without a Prompt Hearing Deprives the Vessel Owner of Procedural Due Process, and the Fifth Circuit's Approval of the District Court's Procedure Creates a Conflict Among the Circuits

The restraint on the TITAN 5 without a prompt hearing[18] violates the due process guarantees of the Constitution and the specific federal rules governing the release of vessels. Admiralty Rule E(4)(f). Appendix p. 27a. In the early 1980's the constitutionality of Rules C and E were often litigated by the Courts. *See Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1991) (finding that Rule C satisfies the minimum requirements of due process); *Alyeska Pipeline Service Co. v. Bay Ridge*, 509 F.Supp. 1115 (D. Alaska 1981) *appeal dismissed* 703 F.2d 381 (9th Cir. 1983) *cert. dismissed* 467 U.S. 1247 (1984) (arrest of vessel under Rule C violated fundamental due process standards); *Merchants National Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981) *cert. dismissed* 456 U.S. 966 (1982). The Fifth Circuit's decision in *Gillespie* (prior to the addition of supplemental Rule E(4)(f) in 1985), held that Rule C arrests were constitutional where a defendant was able to obtain a prompt post-seizure hearing.

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[18]The Court's order, while having a similar effect, did not purport to be either a temporary restraining order or a preliminary injunction pursuant to FRCP Rule 65. The orders issued did not comply with that rule either. There was no affidavit showing irreparable injury (Rule 65(b)). It remained in effect for more than 10 days (Rule 65(b)). It was not set down for hearing at the earliest possible moment (Rule 65(b)). No security was posted to cover costs and damages (Rule 65(c)).

The consequence of a district court's failure to grant a prompt hearing was considered by the Eleventh Circuit in *Neapolitan Navigation Ltd. v. Traycor Marine, Inc.*, 777 F.2d 1427 (11th Cir. 1985). In *Neapolitan*, the defendant whose vessel had been arrested requested a hearing on the arrest. The district court denied the request and an appeal was taken. The Eleventh Circuit stated:

> Although the due process requirements of notice and a pre-seizure hearing are overcome by the necessity of keeping a maritime vessel within the jurisdiction, there is no justification whatsoever for denying the vessel's owner a post-seizure hearing after the *in rem* arrest has taken place, and the vessel's presence is assured.

777 F.2d at 1430.

The court concluded that:

> The failure of the district court to hold an immediate post-seizure hearing was a denial of procedural due process, in violation of the Fifth Amendment.

Id.

The due process concerns noted in *Neapolitan* were directly addressed by the 1985 amendments to Supplemental Rule E. The Advisory Committee's note to the Amendment provides that:

> Rule E(4)(f) makes available the type of prompt post-seizure hearing in proceedings under Supplemental Rule B and C that the Supreme Court has called for in a number of cases arising in other contexts. Although post attachment and post arrests hearings always have been available on motion, an explicit statement emphasizing promptness and elaborating the procedure has been lacking in the Supplemental Rules. Rule E(4)(f) is designed to satisfy the constitutional requirements of due process by guaranteeing to the ship

> owner a prompt post seizure hearing at which he can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings.

Advisory Committee's Note of 1985 to Supplemental Rule E(4)(f). (citations omitted).

The district court and Fifth Circuit rulings completely ignore the constitutional requirements of due process specifically engrafted into the Supplemental Rules governing the arrest and release of vessels.

The district court's October 5, 1995 reasons suggests that the September 25, 1995 telephone conference, was the 'hearing' which due process and Admiralty Rule E (4)(f) require. Appendix p. 70a. It simply was not. The district court simply announced its course of action. No evidence was taken. No argument was heard. At the September 21 telephone conference, the court announced that it would likely order the TITAN 5 seized. When queried on when the Rule E hearing would be, the court responded "October 12". Then on September 25 the court ordered the TITAN 5 seized, and canceled the October 12 hearing. Appendix p. 74a. The court took no evidence at that time on the actual or apparent authority of Glenmore Offshore Contractors or Sakhalin Offshore Contractors to bind the vessel or on the validity of the claimed liens. FEMCO was given no opportunity to present opposing evidence, which it was ready and willing to do.

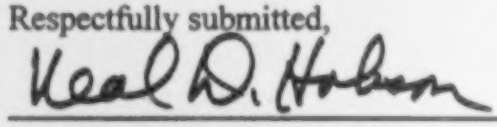
Counsel for FEMCO raised the RuleE(4)(f) and procedural due process abuses to the Fifth Circuit, but they were not commented on by the Fifth Circuit other than to remind the district court of the prompt hearing requirement. The Fifth Circuit's failure to recognize the denial of a prompt post-seizure hearing as a denial of procedural due process

creates a conflict between the Fifth and Eleventh circuits. See *Neapolitan*, *supra* at 1430. This Court should issue a writ to review the conflict and correct the Fifth Circuit's error.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be issued to afford this court the opportunity to clarify the effect of the 1988 amendments on the procedures governing enforcement of maritime liens on vessel owned by foreign states and to correct the district court's departure from established practice, subsequently sanctioned by the Fifth Circuit.

Respectfully submitted,



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APPENDIX

APPENDICE

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U. S. COURT OF APPEALS
FILED
OCT 26 1995
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31042, 95-30993

IN RE: CRANE VESSEL TITAN 5, its engines, tackles, etc., in rem and FAR EASTERN MARINE EXPLORATION DRILLING COMPANY
Petitioners,

Petitions for Writ of Mandamus and/or Prohibition to the United States District Court for the Western District of Louisiana, Lafayette

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together with
ENTRON, LTD. ET AL,
v.
CRANE VESSEL TITAN 5, in rem, and SAKHALIN OFFSHORE CONTRACTORS, LTD, in personam,

---

Nos. 95-30826, 95-30986

Before HIGGINBOTHAM, DUHÉ, and BENAVIDES, Circuit Judges.

BY THE COURT:

All petitions for mandamus, prohibition, or other extraordinary relief are DENIED with the understanding that the district court shall promptly hold a hearing pursuant to Supplemental Admiralty Rule E(4)(f) in which the plaintiffs shall be required to "show why the arrest or attachment should not be vacated." See 46 U.S.C. §§ 31341(a)(4)(B); 31342(a). Petitioners are not entitled to an order dissolving the arrest as a remedy to the asserted procedural defects in the arrest order. Local 391, International Brotherhood of Teamsters v. Ward, 501 F.2d 456, 458-59 (4th Cir. 1974; see also Neopolitan Navigation, Ltd. v. Tracor Marine, Inc., 777 F.2d 1427, 1430 (11th Cir. 1985).

All orders issued by the district court are in full force and effect. Our precedents establish that the decision whether to exercise dual jurisdiction over a case is one of reasoned choice. United States v. Dunbar, 611 F.2d 985, 987-89 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980); United States v. Hitchmon, 602 F.2d 689-692-94 (5th Cir. 1979) (en banc). Petitioners provide us with no good reason why we should vacate the district court's orders. The district court's arrest of the vessel did not materially alter the status of the case, and we will not dissolve the order on that ground.

Petitioners have properly invoked our appellate jurisdiction under the collateral order doctrine concerning the district court's denial of their motion to dismiss based upon the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-10. Regarding that issue, we AFFIRM. 28 U.S.C. §1605(b) specifically contemplates suits in rem to enforce maritime liens against a foreign vessel engaged in commercial activity. This more specific language overrides the general provisions of 28

U.S.C. §§1609-10. See Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973).

Regarding lack of notice, the circuits uniformly agree that defects in service upon an agency or instrumentality of a foreign state, as opposed to a foreign state itself, may be cured by actual notice, so long as no prejudice resulted from the defects. See, e.g., Straub v. A. P. Green, Inc., 38 F.3d 448, 453 (9th Cir. 1994) (construing 28 U.S.C. §1608(b)); Transaero, Inc. v. La Fuerza Aerea Bolivana, 30 F.3d 148, 153 (D.C. Cir. 1994) (collecting cases), cert. denied, 115 S. Ct. 1101 (1995). In all briefs before this court, FEMCO has asserted that it is an agency or instrumentality of a foreign state within the meaning of 28 U.S.C. §1603(b). FEMCO has retained counsel and filed numerous pleadings before this court and the district court, suggesting that it has received actual notice of this litigation. FEMCO has made no claim of prejudice from the faulty notice. Accordingly, any defect in notice has been cured, and the immunity exception outlined in 28 U.S.C. §1605(b) applies.

Regarding the Brown and Root lien, the petitioners have NOT made convincing arguments that we should consider this issue at this interlocutory stage of the litigation. We decline to do so.

Because of the confusion accompanying the numerous petitions, motions, and appeals currently or previously before this court, we take this opportunity to clarify the current status of this case before this court. We retain no jurisdiction over any filing arising out of this litigation. All petitions are DENIED. All motions are DENIED. The district court's holding on FSIA immunity is AFFIRMED. Unless specifically mentioned in the body of this order, all other appeals are hereby REMANDED to the district court for further proceedings consistent with this order.

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
OCT 05 1995
ROBERT H. SHEMWELL, CLERK
BY /S/
Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ENTRON, LTD. and ENTRON OFFSHORE (A.P.) PTE., LTD. *
CIVIL ACTION NO. 95-0460
VERSUS *
JUDGE HAIK
CRANE VESSEL TITAN 5, in rem, and SAKHALIN OFFSHORE CONTRACTORS, LTD., in personam *
MAGISTRATE JUDGE METHVIN

****

RULING

****

Considering, the Motion for Arrest of Vessel, the supporting and opposing memoranda, exhibits, and oral arguments, the Court, in compliance with the order of the United States Fifth Circuit Court of Appeals, herein provides findings of fact and conclusions of law with respect to the following issues:

1. Whether the Titan 5 is immune from pre-judgment seizure under the Foreign Sovereign Immunities Act.

The Foreign Sovereign Immunities Act (28 U.S.C. § 1602 et seq.), which has been invoked in this matter by Defendant, FEMCO, in response to the Motion to Arrest the

Titan 5, represents a codification of a restrictive policy of sovereign immunity. The doctrine is based on the principle that a state and its instrumentalities should not be immune from its private acts and should only be immune for those acts which are public in nature. Shell Oil Company v. M/V Itanage, 630 F.Supp. 1423, 1424 (M.D. Fla. 1993) This policy of "restrictive" foreign sovereign immunity is clearly embodies in 28 U.S.C. § 1605(b) which provides in pertinent part:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state...

In the case at bar, Oil Services and Trading, Inc., as well as several other claimants, have filed complaints to enforce maritime liens against the vessel Titan 5. It is clear to the Court from documents filed into the record of this matter that each of these maritime lien claims arises from the supply of various necessaries by the claimants for or on behalf of the vessel in question and total approximately $800,000.00. It is also clear (in part from FEMCO own admission) that there is no question that the Titan 5 was engaged in purely commercial activity.

Thus, based on these facts, the Court finds the above quoted-statute applicable in this matter. The clear and unambiguous language of the above-cited provision indicates to the Court that, in circumstances such as those involved in this case, wherein the foreign state and/or an instrumentality of the foreign state are engaged in purely commercial activity and are not exercising any official acts of state, neither the foreign state nor its instrumentality falls under the protection of the

Foreign Sovereign Immunities Act. Therefore, the foreign state (in this case, Russia) as well as any instrumentality of the foreign state (in this case, the vessel Titan 5) is subject to suit like any other private entity.

In its opposition to the claimant's Motion for Arrest of the Titan 5 and its Suggestion of Sovereign Immunity, FEMCO cites 28 U.S.C. §1610(d). This provision provides as follows:

> The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--
>
> > (1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver of the foreign state may purport to effect except in accordance with the term of the waiver, and
> > (s) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

The Court agrees that, at first reading, this provision presents a seeming contradiction to 28 U.S.C. 1605(b). The Court further recognizes that the Foreign Sovereign Immunities Act itself is a gray area of law, containing numerous provisions, many of which are obtuse and unclear. However, the Court maintains that the more specific provision, 28 U.S.C. 1605(b) (explicitly referencing in rem actions to enforce maritime liens), rather than the more general provision, 28 U.S.C. 1610 (speaking only in broad terms of attachment)

should be applicable in this instance. A contrary interpretation of the interaction of these particular provisions of the Foreign Sovereign Immunities Act would allow foreign entitles to charter their merchant fleets in for-profit commercial ventures in total disregard to internationally established and recognized maritime lien policies. The Court refuses to render a decision which would result in such inequitable and absurd consequences.

2. The applicability of and compliance with the notice and valuation provisions contained in 28 U.S.C. 1605(b-c).

Although the Court finds a foreign state is subject to a suit to enforce a maritime lien against a vessel of the foreign state when the maritime lien is based upon a commercial activity of the foreign state, the Court recognizes that certain prerequisites to suit must be met. Specifically, 28 U.S.C. 1605(b) indicates that such a suit may only be maintained when:

> (b)(1) notice of suit is given by delivery of a copy of the summons and of the complaint of the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and
>
> (2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as

provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, the date such party determined the existence or the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. The decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

The Court finds that the notice requirements contained in the above-cited provisions have been met in this case. Specifically, it is the Court's understanding that notice of these proceedings was given to the captain and crew of the Titan 5 upon delivery of a copy of the summons and complaint. Furthermore, the Court has ordered that the United States

Marshall Service arrest the Vessel Titan 5. Thus, the arrest of the vessel itself, according to the statute, shall be deemed to constitute valid notice. In accordance with the statute, the valuation of the vessel shall also be determined at the time of arrest. Therefore, the Court finds that any objections or exceptions to compliance with the valuation provision of this statute would be premature at this time.

3. The legal significance, with regard to notice and the opportunity for a hearing, of the presence of the Titan 5's Russian-speaking captain at the hearing held on June 14.

The hearing held by this Court on June 14, 1995 was conducted in response to several motions filed on behalf of claimant, Oil Services and Trading, Inc. Specifically, on May 24, 1995, Oil Services and Trading, Inc. filed a Motion for Leave of Court to file an Intervening Complaint to enforce a Maritime Lien along with a Motion to Arrest the Vessel, Motion to Appoint a Substitute Custodian, and Motion to Move the Vessel to the facilities of the substitute custodian. Of particular significance, Oil Services also included in its motions at that time a Motion to Remove the Crew on board the vessel at the time and to have them deported.

On review of the various documents submitted with Oil Services Motions, it became apparent to the Court that there was a possibility that the crew of the Titan 5, stranded in Morgan City, Louisiana, was experiencing some difficulties obtaining certain necessities, such as money, food, fuel and electricity. Thus, the sole purpose of the June 14 hearing, as specifically stated by the Court, was "to see if they are being paid and taken care of while they are on the vessel." The Court did "not want to do anything that would harm the three men who are on the vessel."

The Court emphasizes further that this hearing was not set up for the purpose of determining whether the vessel was

subject to seizure or arrest. Indeed, the Minute Entry issued by the Court reflecting the Court's order which was based on the testimony and representations made at the June 14, 1995 hearing, merely rescheduled a hearing on the Motion to Arrest for July 18, 1995 and, in the interim, required that the vessel not be moved until further order of the Court. The Court was advised then that the vessel could not be self propelled and was in need of much mechanical repair. The reason for the June 14th order was to protect the crew from being deported and perhaps suffering criminal sanctions in their homeland (which was indicated by the captain) while at the same time allowing the owners time to pay off the debts and not allowing the vessel to depart in the interim. Thus, as this hearing was only to determine the status (as well as the wishes and concerns of the crew of the vessel), the Court is not convinced that notice and opportunity for a hearing was indeed required at that time.

However, even in the event notice and opportunity for hearing was required, the Court finds that service upon the captain and crew of the vessel on behalf of the vessel itself constitutes sufficient notice and opportunity for hearing. Specifically, the Court notes that at the June 14, 1995 hearing, the captain of the Titan 5, as well as two other crew members appeared in representation of the Vessel Titan 5. along with the crew members, Mr. Frederick Frederickson, who represented himself to have been an agent for the charterer of the vessel, appeared at the hearing. Although one of the crew members spoke English, the Court out of an abundance of caution, appointed a Russian language interpreter to assist in the hearing scheduled for June 14, 1995 and all other ancillary proceedings. Thus, the Court finds that the Vessel Titan 5, the charterer, the captain and the owner had actual knowledge of the existence and status of the June 14, 1995 proceeding and had thus, had adequate opportunity for hearing.

The Court further finds that any defects which may or may not have existed in notice and opportunity for hearing were cured at the hearing which was conducted via telephone conference with counsel for all parties in interest on September 25, 1995. At this hearing, the Court, after reviewing all supporting and opposing memorandum, Vacated its Order of June 14, 1995 on Motion by FEMCO, granted Oil Service's Motion to Arrest Vessel, Appoint a Substitute Custodian and Move Vessel, denied Oil Service's Motion to Remove Crew, and denied FEMCO' pending Motion to Dismiss for Insufficiency of Service of Process. After making these rulings, the Court also ordered that the October 12, 1995 hearing be dismissed as Moot. It cannot be disputed that FEMCO and the Vessel Titan 5, had notice as well as opportunity for hearing with regard to these motions as they were represented throughout these proceedings by their retained counsel Mr. Neal Hobson. Therefore, the Court specifically finds that FEMCO and the Vessel Titan 5 received both notice and opportunity for hearing consistent with due process concerns.

On October 5, 1995, the Court held another telephone conference in response to the order of the Fifth Circuit Court of Appeals dated October 3, 1995. The purpose of this conference was an attempt to comply with the order of the Fifth Circuit.

THUS DONE AND SIGNED this 5th day of October, 1995 at Lafayette, Louisiana.

/s/ Richard T. Haik

RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

U. S. COURT OF APPEALS
FILED
NOV 29 1995
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 95-31042 & 95-30993

IN RE: CRANE VESSEL TITAN 5, its engines, tackles, etc., in rem and FAR EASTERN MARINE EXPLORATION DRILLING COMPANY,
Petitioners,

Petitions for Writ of Mandamus and/or Prohibition to the United States District Court for the Western District of Louisiana, Lafayette

---

together with

Nos. 95-30826 & 95-30986

ENTRON, LTD. et al,
v. Plaintiffs-Appellees
CRANE VESSEL TITAN 5, in rem, and SAKHALIN OFFSHORE CONTRACTORS, LTD, in personam,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Louisiana, Lafayette

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/26/95, 5 Cir., _____, _____ F.3d _____)

(Nov 29 1995)

Before HIGGINBOTHAM, DUHÉ, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/ Patrick S. Higginbotham

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

February 16, 1996

Mr. Neal D. Hobson
909 Poydras Street
Suite 2300
New Orleans, LA 70112-1017

Re: Crane Vessel Titan 5, in rem and its claimant, Far Eastern Marine Exploration Drilling Company
v. Entron, Ltd., et al.
Application No. A-683

Dear Mr. Hobson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on February 16, 1996, extended the time to and including March 28, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, clerk

By /s/ Troy D. Cahill
Troy D. Cahill
Assistant Clerk

The Foreign Sovereign Immunities Act provides:

§1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§1603. Definitions

For the purposes of this chapter [28 U.S.C.S. §§ 1602 *et seq.*]

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted October 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed int he United States in connection with a commercial activity of the foreign state elsewhere; or upon an

act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are an issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by successor gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious, prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or

not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to that person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was

involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following [46 U.S.C.S. Appx. §§ 911 *et seq.*]). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed in suit in rem might have been maintained.

§1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like

circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§1607. Counterclaim

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in the kind from that sought by the foreign state.

§1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by deliver of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within thirty days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services - and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agency authorized by appointment or by law to receive service of process in the

United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state-

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made -

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any

such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§1609. Immunity from attachment and execution of property of a foreign state.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if-

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property-

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment; or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign State, provided that attachment in aid of execution, or execution, would not be consistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if-

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2),(3) or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry

of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if-

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign State shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

§1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of hose organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organization Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if-

(1) the property is that of a foreign central bank or money authority held for its own account, unless such bank or

authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is entitled to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

RULE E

Actions In Rem and Quasi In Rem: General Provisions

(4)(f) Procedure for Release from Arrest or Attachment. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

MINUTES OF WITNESS INTERROGATION
August 1st, 1995

I, Tamara I. Pavlova, Notary Public of Moscow City, on the basis of Article 30 of the Russian Federation Law on notarial services requested by Mr. Ivan N. Chernov, Director of Oil and Gas Offshore Deposits Development Department of the "Rosneft" State Enterprise (26/1) Sofiyskaya Embankment, Moscow) as per civil action N 95-0460. Section L-O, opened in the United States District Court, Western District of Louisiana St., Lafayette Division (Judge Haik and Mag. Judge Methvin versus the crane vessel "Titan 5") in order to provide proofs has interrogated the witness Mr. Ivan N. Chernov, resident of Moscow City, 13, Bld. 3, Apartment 443, Flotskaya Str., Russia.

Mr. Ivan N. Chernov has been warned by me about responsibility for giving consciously false evidence and refusal to give evidence as per Article 181 and 182 of the Criminal Code of the Russian Federation in confirmation hereof he put here his signature:

Ivan N. Chernov_____.

In essence of the questions put before him Mr. Ivan N. Chernov has testified as follows:

1. He is a member of the Board of Directors of Sakhalinmorneftegas Public Company.

2. He is also Director of Oil and Gas Offshore Deposits Development Department of the State Enterprise "Rosneft" of the Ministry of Fuel and Power of the Russian Federation which is responsible for all operations with energy resources, including oil and gas, in the Russian Federation.

The State Enterprise Rosneft has been set up by Resolution N 357 of the Council of Ministers, the Government

of the Russian Federation dated April 22nd, 1993 in fulfillment of Decree N 1403 of the President of the Russian Federation "On Peculiarities of Privatisation and transformation of State Enterprises, Productive and Scientific Productive Associations of oil and oil processing industries and oil products provisions" dated November 17th, 1992, into Joint Stock Companies.

Sakhalinmorneftegas (Sakhalin Oil and Gas Company) is a public joint stock company organized in Sakhalin, the Russian Federation, the controlling block of shares of which is under commercial management of the State Enterprise Rosneft.

The Far Eastern Marine Board of Prospecting Drilling is a structural subdivision of Sakhalinmorneftegas and by 100% belongs to the enterprise.

There is only one issue of common shares of Sakhalinmorneftegas granting the voting right.

The total quantity of voting shares makes up 60, 930, 882, the State Enterprise Rosneft possessing 30, 871, 650 shares or 50.6666% on behalf of the State.

Consequently, the controlling block of voting shares of the company belongs to the state on behalf of which the state enterprise Rosneft manages the shares.

The Far Eastern Marine Board of Prospecting Drilling is the sole owner of 100% right to the crane vessel "Titan-5" which is the subject of the above mentioned court action.

The navigable crane "Titan-5" is the property of the Russian Federation and its alienation infringes upon the state interests of Russian.

RUSSIAN LOGO **TO WHOM IT MAY CONCERN**

State Enterprise "Rosneft" confirms entering of Joint Stock Company "Sakhalinmorneftegas" into the SE Rosneft.

JSC "Sakhalinmorneftegas" is the state enterprise and all basic funds, including "Titan-5", are the property of the state.

Vice-president of SE Rosneft /s/ I. Letchinez

48th STORY of Level 1 printed in FULL format
Source: Reuter Textline
Novecon
February 27, 1995

LENGTH: 240 words
HEADLINE: RUSSIA: SAKHALINMORNEFTEGAZ DEVOTED TO ROSNEFT
BODY:

Sakhalinmorneftegaz is to form a merger with an oil company to be based on the state-run Rosneft company, Sergey Bodanchikov, director general of the Sakhalinmorneftegaz joint-stock company, has announced.

Sakhalinmorneftegaz went public on January 10, 1995, and Rosneft acquired a controlling interest (51% of shares). Despite its small size and low oil output (in 1994, the oil yield stood at 1.5m tonnes), the Sakhalin enterprise is involved in the Sakhalin-1 project alongside the Japanese SODECO and the American Exxon companies. The project is estimated at a value of $ 10b, while the proven oil and gas reserves amount to 291m tonnes and 420.8b cu.m, respectively. Oil and gas output may reach 10m tonnes and 15b cu. m per annum. Furthermore, the legal framework used to incorporate Sakhalinmorneftegaz will also extend to other Sakhalin projects.

(c) Novecon 1995

NOVECON
COMMERSANT, February 25, 1995, P9
LOAD-DATE: February 28, 1995
LEXIS:NEXIS

RUSSIAN HEADING AND LOGO

No. 12/95 12 July 1995 r.

CERTIFICATE

WE HEREBY CONFIRM THAT FAR EAST MARINE EXPLORATION DRILLING COMPANY (FEMCO) IS THE SHIPOWNER OF M/V "TITAN-5".
POINTED VESSEL IS PERMITTED TO SAIL UNDER THE FLAG OF RUSSIAN FEDERATION.
SHE IS REGISTERED AT KHOLMSK TRADE PORT.

REGISTRY NO. 418 DATED MARCH 14, 1989.
HARBOUR MASTER /s/ V. GRITSAY
/SEAL/

DECREE

of the President of the Russian Federation

On peculiarities of privatization and transformation into joint-stock companies of state enterprises, production associations and scientific and production associations of oil industry, oil refining industry and oil products supply branch

For the purposes of increasing efficiency of oil industry complex of the Russian Federation and providing reliable supply of consumers with oil and oil produces and in compliance with the Decree of the Prsident of the Russian Federation dated August 14, 1992 No. 992 "On peculiarities of privatization and transformation into joint-stock companies of state enterprises, associations and organizations of fuel and energy complex"

herewith RESOLVED:

1. To transform into joint-stock companies till December 31, 1992 the state enterprises, production associations and scientific and production associations engaged in oil recovery, refining, oil transportation and crude oil and oil products supply in accordance with the lists given in Supplement 1, 2 and 3 and incompliance with the procedures, fixed in the "Regulations on commercialization of state enterprises with their simultaneious transformation into open-end joint-stock companies", approved by the Decree of the President of the Russian Federation dated July 1, 1992 No. 721 "On organizational arrangements on transformation of state enterprises and voluntary associations of state enterprises into joint-stock companies" with taking into account the peculiarities specified by the present Decree.

The State Property Management Committee of the Russian Federation in concordance with the Ministry of Fuel an Energy of the Russian Federation shall have to determine

within 10 days period the procedure of privatization as well as the procedure and terms of formation of privatization commissions and bring them to the notice of enterprises and associations, noted in Supplements No. 1 and 2 to the present Decree.

2. To prescribe that while transforming into joint-stock companies those enterprises and associations, noted in Supplements No. 1 and 2 to the present Decree.

- 25% of shares of each transformed joint-stock company shall be the preferred ones and shall not be subject to conversion into the common shares during their subsequent resale;
- all shares allotted for a certain period of time to the federal ownership shall be the voting ones;
- all privileges to the members of work collectives and administration shall be granted in accordance with the State program for privatization of state and municipal enterprises in the Russian Federation for 1992 (version 1 of clause 5.4) without limitations to purchase common shares for the sum multiple to the guaranteed minimum monthly salary rate.

3. To prescribe that while transforming into joint-stock companies those enterprises and associations, noted in Supplements No. 1, 2 and 3 to the present Decree

- enterprises being a part of production and scientific and production associations shall be transformed into subsidiary joint-stock companies. 38% of the total number of their shares (being common ones) are transferred to the stock of the joint-stock companies, established during the transformation of the corresponding associations.

- reorganization of enterprises and associations, assuming segregation of subdivisions from their structure, transformation of enterprises and subdivisions into independent joint-stock companies, establishment of joint-stock companies on the basis of groups of enterprises or their consolidated share holdings shall be carried out by the Government of the Russian Federation on the basis of the joint submission by the State Property. Management Committee of the Russian Federation, the Ministry of Fuel and Energy of the Russian Federation and the Russian Federation State Committee on Antimonopoly Policy and New Economic Structures Support with taking into account the opinions of work collectives;

- the Regulations of joint-stock companies, established during transformation of the associations and enterprises, being not a part of association, as well as programs of their privatization shall be approved by the State Property Management Committee of the Russian Federation on submission of the Ministry of Fuel and Energy of the Russian Federation.

4. The Government of the Russian Federation on the joint submission by the State Property Management Committee of the Russian Federation, the Ministry of Fuel and Energy of the Russian Federation and the Russian Federation State Committee on Antimonoply Policy and New Economic Structures Support shall have to approve the establishing documents:

a) of the state enterprise "Rosneft" for commercial control of shareholdings, secured for 3 years as federal property, of the joint-stock companies, established during transformation associations and enterprises, noted in Supplement No. 1 to the present Decree, till their transformation into independent oil

production companies. The shareholdings specified shall be transferred to the state enterprise "Rosneft" by the State Property Management Committee of the Russian Federation on the agreement:

b) of the joint-stock companies - oil production companies "Langepas-Urai-Koglymneft" ("LUKoil"). "YuKOS" and "Surgutneftegas" and to deposit into their stock 38% of the shares of the joint-stock companies, established during transformation of the associations and enterprises, noted in Supplement No. 2. The shares deposited into the stock of the above mentioned shall be the common ones.

c) of the joint-stock companies "Transneft" and "Transnefteproduct" and to deposit into their stock 51% of the shares of the joint-stock companies, established during transformation of the enterprises and associations engaged in crude oil and oil products transportation, noted in Supplement No. 3, with securing the shares of the companies as federal property without right of their transfer for control to the third parties for the whole period of validity of prohibition for the privatization of pipeline transportation systems, imposed by the State Program on Privatization of State and Municipal Enterprises in the Russian Federation for 1992.

5. To prescribe that the shares of the joint-stock companies and oil production companies, established in accordance with the present Decree, shall be distributed as follows:

a) 38% of the shares of the joint-stock companies, established during transformation of the enterprises and associations, noted in Supplement No. 1 tothe present Decree, 45% of the shares of the oil production companies, established in compliance with subitem "b" of item 4 of the present Decree,

as well as 49% of the shares of the joint-stock companies, established during transformation of the enterprises and associations, noted in Supplement No. 3, shall be secured for three years as federal property;

b) 40% of the shares of the oil production companies, established in compliance with subitem "b" of item 4 of the present Decree shall be subject to be sold on investment auctions within two years in accordance with the procedures and terms, jointly fixed by the State Property Management Committee of the Russian Federation and the Ministry of Fuel and Energy of the Russian Federation. For all th is 20% of the shares shall have to be sold in 1993 and their nominal value is paid in privatizing vouchers. The portion of the shares sold to the foreign investors should not exceed 15% of the shares of the joint-stock company;

c) the remainder of the shares of the joint-stock companies, established during transformation of the enterprises and associations, noted in Supplements No. 1 and 2, after the transfer and sale on preferential terms to the members of the work collectives and to the persons granted the same status and after distribution in compliance with subitems "a" and "b" of item 5 as well as 15% of the shares of the oil production companies, established in compliance with subitem "b" of item 4 of the present Decree shall be subject to be sold for privatizing vouchers. For all this the State Property Management Committee of the Russian Federation shall have to ensure the sale of the remainder of the preferred shares (after the transfer and sale on preferential terms to the members of the work collectives and to the persons granted the same status) and 5% of the common shares of the joint-stock companies on investment auctions for privatizing vouchers to the population

of the oil producting regions, constituting the Northern national minorities, and to the members of the work collectives of the joint-stock companies, established during transformation of the enterprises and associations engaged in crude oil and oil products transportation (Supplement No. 3).

6. To prescribe that the money resources, obtained from the sale of shares and subjected to entering in the Federal budget of the Russian Federation, as well as dividends paid on shares, secured as federal property, of the joint-stock companies, established during transformation of the enterprises and associations, noted in Supplements No.1, 2 and 3 to the present Decree, shall be invested for target-oriented financing of technical re-equipment, reconstruction and expansion of production capacities, for carrying out measures on environmental protection as well as for research and experimental engineering works on crude oil production, transportation and refining and on crude oil and oil products supply.

The above specified money resources of the join-stock companies, established during transformation of the enterprises and associations, noted in Supplement No. 1 shall be transferred for disposal of the state enterprise "Rosneft" and those of the joint-stock companies established during transformation of the enterprises and associations, noted in Supplement No. 2 and 3, shall be transferred for disposal of the corresponding oil production companies.

All dividends paid on shares, secured as federal property, of the joint-stock companies, established during transformation of the enterprises and associations, noted in subitems "b" and "c" of item 4 of the present Decree, shall be left to those companies for their own disposal.

R. A. OSBORN, JR.
Attorney at Law
235 Derbigny, Suite 201
Gretna, Louisiana 70053

April 7, 1995

BY FAX/318-262-6846
Mr. Keith Savoie
U.S. Marshall's Service
Federal Building
Lafayette, Louisiana

RE: Entron, et al vs.
C/V TITAN 5, et al
Civil Action No. CV95-0460

Dear Mr. Savoie:

Please accept this as your authorization pursuant to Rule 25.06 to release the arrest of the M/V TITAN 5. We expressly agree to hold the U.S. Marshall and his deputies harmless of and from any and all liability as a result of the release of the vessel pursuant to this authorization.

I believe you have adequate funds on deposit to offset any charges which may have been incurred to date.

I would appreciate confirming the release of the vessel to me.

Very truly yours,
/s/R.A. Osborn, Jr.

RAOjr:d

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS

ENTRON, LTD. and ENTRON OFFSHORE (A.P.) PTE., LTD.	*	CIVIL ACTION NO. 5-0460
VERSUS	*	JUDGE HAIK
CRANE VESSEL TITAN 5, in rem, and SAKHALIN OFFSHORE CONTRACTORS, LTD., in personam	*	Mag. Judge Methvin

****

ORDER

****

Upon consideration of the motions pending before this Honorable Court in the above-entitled and numbered cause;

IT IS HEREBY ORDERED that the Crane Vessel TITAN 5 is within the jurisdiction of this Honorable Court; and

IT IS FURTHER ORDERED that the Crane Vessel TITAN 5 shall remain in the jurisdiction of this Honorable Court pending hearing scheduled for Wednesday, June 14, 1995, at 1:30 p.m.

THUS DONE AND SIGNED this 12th day of June, 1995 at Lafayette, Louisiana.

/s/Richard T. Haik
RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ENRON, LTD. AND ENRON OFFSHORE *
(A.P.) PTE., LTD *
DOCKET NO. 95-CV-460 *
JUNE 14, 1995 1:54 P.M. *
VS. *
CRANE VESSEL TITAN 5, in re, and *
SAKHALIN OFFSHORE CONTRACTORS, *
LTD., in personam *
Lafayette, Louisiana

* *

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS BEFORE THE HONORABLE
RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE
JUNE 14, 1995

MARY V. THOMPSON
OFFICIAL COURT REPORTER
161 FEDERAL BUILDING
705 JEFFERSON STREET
LAFAYETTE, LOUISIANA 70501

APPEARANCES

FOR OIL SERVICES & TRADING, INC.
ADAMS & REESE
BY: MR. PHILIP A. FRANCO
4500 One Shell Square
New Orleans, LA 70139

FOR DOUBLE EAGLE MARINE, INC.
PERRIN, LANDRY,
DELAUNAY & DURAN
BY: SCOTT DARTEZ

225 La Rue France
Lafayette, LA 70508

THE INTERPRETER: Mr. Oleg Kouznetson
ALSO PRESENT: Sergey Korytkin
Sergey Bondarenko
Freddie Fredricksen

PROCEEDINGS

(Call to order of the court.)

THE COURT: You may be seated, please. Before we do anything, let's swear the interpreter in. Would you come forward, please.

(The Interpreter is sworn.)

THE COURT: All right. What is your name, please?

THE INTERPRETER: Oleg Kouznetsov.

THE COURT: I'm going to call you Oleg. Okay? Why don't you stay right here because what we're going to do is I'm going to call up the members of the crew. There are three members left of the crew or two?

MR. FREDRICKSEN: Three left, but two present here.

THE COURT: You two gentlemen who are the members of the crew, would you come up, please. Ask them to come up, please.

***

THE COURT: Who is the captain?

THE INTERPRETER: Mr. Bondarenko.

THE COURT: I first want to tell you that you are not in trouble. I want you to understand that clearly.

THE INTERPRETER: He understands.

MR. BONDARENKO: I understand.

THE COURT: We have an intervention filed in this matter.

THE INTERPRETER: Intervention, what is that?

THE COURT: There is a lawsuit and what has happened is Oil Services, Inc. wants to seize the vessel. Can you tell them that?

THE INTERPRETER: (Complies.)

THE COURT: Who represents Oil Services, Inc.?

MR. FRANCO: I do, Your Honor.

THE COURT: And you are?

MR. FRANCO: Philip Franco, Your Honor, from Adams & Reese.

THE COURT: Mr. Philip Franco from Adams & Reese represents Oil Services, Inc. Can you repeat that?

THE INTERPRETER: (Complies.)

THE COURT: Is someone here representing --

MR. FREDRICKSEN: Your Honor, I'm Fred Fredricksen, if I may address the Court. I'm not an attorney. I am trying to acquire the charter for the vessel, and was actually the agent for the people that had the charter before that.

THE COURT: You need to repeat that. We need to talk in short sentences so the interpreter can explain everything. Okay?

I'm going to presume, Mr. Fredricksen, that you know these two gentlemen.

MR. FREDRICKSEN: Yes, I do.

THE INTERPRETER: For until one year they know each other.

***

THE COURT: So they want to seize the vessel and send these three gentlemen from Russia back home. But they want Mr. Fredricksen to pay for it -- to pay for the trip back home.

Am I right, Mr. Franco? You want somebody to pay for it. You don't care as long as it's not you. I'm not sure of Mr. Fredricksen's role --

MR. FREDRICKSEN: No, sur.

THE COURT: What are you?

MR. FREDRICKSEN: At the present time I'm nothing.

THE COURT: Don't say that, Mr. Fredricksen.

MR. FREDRICKSEN: Let me explain my position.

THE COURT: You need to repeat everything we will say.

Who is Glenway Americas?

MR. FREDRICKSEN: Glenway Americas was the agent soliciting contracts for the company that had the charter arrangement with this vessel.

THE INTERPRETER: Excuse me. What means charter?

MR. FREDRICKSEN: When you charter a vessel. Someone can charter a vessel to do work with it or something.

THE COURT: Who is the owner of this vessel?

MR. FREDRICKSEN: Sakhalinmorneftegaz.

THE COURT: Do you have a spelling of that?

MR. FREDRICKSEN: Yes, sir. May I approach the --

THE COURT: Sure. You just can't get her. Is that a Russian company?

MR. FREDRICKSEN: Yes, sir, it is. It is a very large Russian oil company.

THE COURT: This vessel is not owned by the government?

MR. FREDRICKSEN: This oil company is owned by the government. You might ask him.

THE INTERPRETER: It is just a company of Rosneft.

THE COURT: I'm sorry. It's what?

THE INTERPRETER: It is just a company of Rosneft. It's the legal phrase which is used in Russia.

THE COURT: But it is not owned by the government.

MR. FREDRICKSEN: It is state-owned.

THE INTERPRETER: It is just a company by the government control, but stocks belong to the government so government controls a joint stock company.

THE COURT: Did you know that, Mr. Franco, when you wanted to seize it and do all these other things?

MR. FRANCO: I understood -- I thought 51 percent, at least based on my information, was owned by some part of or some form of Russian government, yes.

THE COURT: All right.

MR. FRANCO: But I think what he's saying is -- what I understand is that they owned stock in the company that owns the vessel, but I'm not sure of that so I haven't verified that. In fact, I would like the name of the company that he's given to the Court Reporter.

MR. FREDRICKSEN: I offered you this before. I wanted to show you, Your Honor.

THE INTERPRETER: Let me translate that.

THE COURT: Sure, please.

MR. FREDRICKSEN: Would the Court like a copy?

THE COURT: (Nods head.)

THE INTERPRETER: According to his information, the ship -- 51 percent of the ship belongs to the government and 49 percent of the ship belongs to the stockholders.

MR. FREDRICKSEN: Which is Sakhalin?

THE INTERPRETER: Which is Sakhalin.

THE COURT: All right.

***

THE COURT: Okay. Well, the reason I've had them here is because I do not want to do anything that would harm the three men who are on the vessel. But also there are some legal battles going on for reimbursement, for payment for work that has been done on the vessel.

THE INTERPRETER: And he is asking if the question is about reimbursement for that repair and renovations which were done on that ship, why nobody here in court is present for-- who represents the company, Glenmore Heavy Lifting, which was the company for that ship here in America.

***

THE COURT: Well, I'm going to get to that point later. We're going to find out some answers to questions as we go on.

THE INTERPRETER: He has documents here in court which proves that during that period where that repair and renovation on that ship were done in Galveston that the operating company who was responsible for the ship and who ordered the repair was Glenmore Heavy Lifting Company.

***

THE COURT: Why don't I just order the vessel not leave the jurisdiction of this court, not leave that port, period?

MR. FRANCO: Who would that be binding on except parties to the action?

THE COURT: It would be binding on the gentlemen here. If Mr. Fredricksen -- could you be certain that the only amount of fuel that they have right now is enough to keep the vessel afloat and to keep it operational so they can keep it afloat?

***

THE COURT: What is the value of this vessel? Do you have any idea?

MR. FRANCO: I understand it is not a whole lot more than what is owed to my client. I may be wrong about that.

THE COURT: Give me a hint.

MR. FRANCO: I understand it is $700,000.

THE COURT: This vessel with the crane on it and everything you say is only worth $700,000?

MR FRANCO: I haven't had it appraised, and that is what is being told to me by my client.

***

THE COURT: Okay. Let me ask you something, Mr. Franco. What you want to do is make sure that vessel does not leave this area, is that correct?

MR. FRANCO: Yes.

THE COURT: And what you want to do is leave it where it is with the crew on it until you can complete your negotiations?

MR. FREDRICKSEN: And add one more thing. We have been advised by their office that they've purchased a full container load of parts to fix the crane and that is all I know about that. I don't know if they have been shipped yet. The captain actually mentioned to me at lunch today that an electrician is waiting for an invitation letter from me to come to fix the crane.

THE COURT: Okay.

MR. FRANCO: May I make a suggestion?

THE COURT: Sure.

MR. FRANCO: That's true. The vessel is my concern because I don't want to have to go chase the names I can't even pronounce to get paid. And it is more expensive to actually put it under seizure and it costs all that money to have either the Marshal or the Contents Keeper keep it. So to avoid that is really to the benefit of everyone anyway.

I have two suggestions. One would be that as long as we can ensure some legal way, Your Honor, that the vessel can't be moved, I don't mind waiting another 30 days to make a determination that we're going to officially put it under seizure and then have to order the crew off and give everybody advance notice that that is what is going to happen.

The other alternative is if they can post a bond for that amount, we can do away with everything.

THE COURT: I'm going to order that this vessel not leave the location where it is presently moored.

I'm going to ask that the U.S. Marshal Service contact the United States Coast Guard and provide them with a copy of the order in which they are to ensure that the vessel does not leave the area. And if they do leave the area, I will have the vessel arrested and attached and all crew members and anyone who aided and abetted that to be arrested and attached and brought before this Court.

MR. FRANCO: And then the ship will be under their custody and under the guard of the U.S. Marshal?

THE COURT: No, I'm not going to require them -- I'm not going to require the U.S. Marshals to take custody or control of the vessel. But I am going to require the U.S. marshal to contact the Coast Guard and make them aware that that vessel should not be moved. And if it is moved, then we'll not only put the vessel in the custody of the U.S. Marshal, we'll put the crew and any other person who helped move that vessel in the custody of the U.S. Marshal.

So in other words you work on your vessel, you take care of your vessel, and if we need to come back here to straighten things us, we'll come back to court or you will be receiving something through Mr. Fredricksen or someone else that everything is okay. But it will be a court order. Okay?

I want to make it very clear, they are not under arrest. It is just that the vessel cannot be moved. If these gentlemen wish to go back home or to whence they came, other than this problem of leaving the vessel if they go back home, they are not under arrest. They have done nothing wrong. It is just the vessel. The repairs must be paid for before the vessel leaves the port.

I am also going to set a date for another hearing and my secretary has gone to get my calendar right now.

***

THE COURT: Gentlemen, we are going to change the date to the 18th of July at 10:00. Make it at 9:00. In the meantime, they can have crawfish, gumbo and etoufee'. I'm going to give these back to this gentleman.

I think this is it. Does that take care of the situation?

MR. FRANCO: I think so, Your Honor.

THE COURT: We are going to make sure the Marshal gets a copy of the order, Mr. Fredricksen gets a copy of the order, Mr. Franco gets a copy, and Mr. Dartez gets a copy.

THE INTERPRETER: The Captain also need a copy, too.

THE COURT: No problem. We'll get it to them. We are going to get them a copy also.

Do they understand they cannot move that vessel?

THE INTERPRETER: Yes.

THE COURT: Okay. No problem. Thank you very much.

MR. FRANCO. Thank you, Judge.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

PRESENT: HON. RICHARD T. HAIK, SR., JUDGE, Presiding
Date: June 14, 1995
Mary V. Thompson , Court Reporter
Rita V. Watkins , Minute Clerk
Oleg A. Kouznetsov , Interpreter
COURT OPENED: 1:40 P.M. COURT ADJOURNED: 2.45 P.M.

MINUTES OF COURT

CASE NO. 95-0460 L/O Judge Haik Magistrate Judge Methvin
ENTRON LTD, ET AL VS. SAKHALIN OFFSHORE CONTRACTORS LTD ET AL

APPEARANCES

PHILIP A FRANCO FOR OIL SERVICES & TRADING INC.
SCOTT DARTEZ FOR DOUBLE EAGLE MARINE INC. and
FOR INLAND MARINE SERVICE INC.

CASE CALLED FOR FILINGS:*

_X_ Hearing on motions
___ Jury selection only
___ Trial with/without jury * day
___ Other

VERDICT, RULING, COMMENTS:

IT IS ORDERED that the vessel, TITAN V, shall not leave where it is now moored, Brown & Root, 9752 Highway 90 East, Morgan City, Louisiana, until further order of this Court and the U.S. Marshal shall provide the U.S. Coast Guard with a copy of this order to insure that the vessel does not leave this area.

IT IS FURTHER ORDERED that if the vessel TITAN V moves, the vessel will be arrested and attached and placed in the custody of the U.S. Marshal. Any crew member who aids or abets in moving the

vessel shall be arrested and brought before the Court for contempt proceedings.

IT IS FURTHER ORDERED that another hearing is scheduled in this matter for July 18, 1995, at 9:00 o'clock A.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS

Date: 8/1/95
Reply to: JUDGE RICHARD T. HAIK
Subject: #95-460 - Entron Ltd., et al v. Sakhalin Offshore, et al
To: All Counsel of Record

MINUTE ENTRY

The Intervenor's Motion for arrest of Vessel and Motion for Appointment of Substitute Custodian, previously scheduled to commence on 8/2/95 is rescheduled to commence on 10/12/95 at 9:30 a.m., WITH ORAL ARGUMENT.

Defendant's Motion to Vacate Court's Order of 6/14/95 will also be heard WITH ORAL ARGUMENT on 10/12/95 at 9:30 a.m.

The reason for this continuance is as follows:

(1) At the request of Neal Hobson, of Milling, Benson, Woodward, Hillyer, Pierson and Miller; counsel for Far Eastern Marine Company, this hearing was continued.

(2) Not being aware of the local rules of the Western District of Louisiana, an untimely memorandum was filed into the record only a few days prior to the hearing.

(3) Because of the extensive attachments, some being filed in the Russian language, it is necessary that this court continue this hearing until 10/12/95 WITH ORAL ARGUMENT.

(4) No memos pertaining to this matter shall be received less than 15 days prior to the October hearing.

(5) The court's order of June 14, 1995, shall remain in effect until further order of this court.

RTH/jds

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS

ENTRON, LTD. and ENTRON OFFSHORE (A.P.) PTE., LTD.	*	CIVIL ACTION NO. 95-0460
VERSUS	*	SECTION L-O
CRANE VESSEL TITAN 5, in rem, and SAKHALIN OFFSHORE CONTRACTORS, LTD., in personam	*	JUDGE HAIK Mag. Judge Methvin

****

ORDER

Considering the foregoing motion for immediate hearing, the Court hereby fixes FEMCO's motion for immediate hearing for hearing on the ___ day of August, 1995.

Lafayette, Louisiana, August 9, 1995.

_____
UNITED STATES DISTRICT JUDGE

DENIED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ENTRON, LTD. and ENTRON	*	CIVIL ACTION
OFFSHORE (A.P.) PTE., LTD	*	NO. 5-0460
	*	
VERSUS	*	September 21, 1995
	*	2:00 p.m.
CRANE VESSEL TITAN 5,	*	
in rem, and SAKHALIN	*	
OFFSHORE CONTRACTORS,	*	
LTD., in personam	*	Lafayette, Louisiana

****

REPORTER'S OFFICIAL TRANSCRIPT OF
HEARING TO DETERMINE FEASIBILITY OF SEIZURE
AND MOVING OF VESSEL
BEFORE THE HONORABLE RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

MARY V. THOMPSON
OFFICIAL COURT REPORTER
161 FEDERAL BUILDING
705 JEFFERSON STREET
LAFAYETTE, LOUISIANA 70501

APPEARANCES

FOR ENTRON, ET AL:

By: RAYMOND A. OSBORN, JR.
P.O. Box 99
Gretna, LA 70054

FOR OIL SERVICES & TRADING, INC.:

Adams & Reese
By: PHILIP A. FRANCO
4500 One Shell Square
New Orleans, LA 70139

FOR FAR EASTERN MARINE, ET AL:

Milling, Benson, Woodward, Hillyer Pierson & Miller
By:NEALHOBSONandBENSCHUPP
909 Poydras Street, Suite 2300
New Orleans, Louisiana 70112

FOR DOUBLE EAGLE MARINE, ET AL:

Perrin, Landry, DeLaunay & Durand
By: ALLAN DURAND
225 LaRue France
Lafayette, LA 70508

PROCEEDINGS

THE COURT: I apologize for the inconvenience, I was with the judge who is coming in here, hopefully, and we're trying to talk him into it, Judge Melancon. We had meetings with other judges.

We've already got all the appearances.

. . .

THE COURT: Okay. Guys, here is the situation. We have a hearing coming up in October on several issues. My main concern about this whole matter at this very moment -- I have two concerns. One concern is about the three or four individuals who still remain on that vessel from Russia, and I'm not sure if they're getting paid or how they're living or what is happening, and they do not want to leave that vessel because it's my understanding if they leave the vessel they have some serious problems when they get back to Russia.

Be that as it may, I have serious concerns for their livelihood and their ability to exist. I at one point thought about sending them back to Russia, and they don't want to do that because they can't leave their vessel so we're kind of in a catch 22.

I don't know, secondly, if the vessel is able to leave. Thirdly, the vessel is over at Brown & Root whom I thought wanted the vessel, but now they're trying to sell that dock and they can't sell it because Judge Shaw has a vessel there and we have this vessel there. So we need to find a place to move it. And we also have to pay for the storage fees and the storage of this vessel as court costs or something.

But what I need from y'all is some input as to where this vessel should go if any of you have any preferences, and can

we resolve these issues before we have the hearing in October so that everyone can go on with t hat they have to do.

And I'll entertain anyone who speaks first as long as you identify yourselves.

. . .

MR. FRANCO: In addition to that, the vessel -- our motion for seizure has not been granted. We do not have the vessel technically under seizure. And as far as I'm concerned, the charges that are being levied or not for the account of my client or anybody who doesn't have it officially under seizure, we've so advised the owners that that is our position.

And in addition to what Mr. Osborne said, we were under the impression that Brown & Root was never charging that vessel to be there. And I'm not so sure that this charge is not an after-the-fact thought. So I want to create that question. And I don't believe that they're doing anything except being parked there.

I also understand that if we only wanted to move it to Mr. Cheramie's place and he doesn't act as keeper, because it is not technically under seizure by any party, I don't think he's going to charge anything for parking it there or docking it there. So there is another possibility.

THE COURT: Well, Judge Methvin back in April of '95 ordered that the vessel could be moved from the Brown & Root facility to the Marine Contractor, Inc.'s facility but it we never moved.

. . .

MR. HOBSON: Judge, I apologize for my voice. I'm just getting over a bad sore throat here.

THE COURT: Okay.

MR. HOBSON: It is not hurting. It just may not come across too clearly.

I don't think there is any need to have any concern for the crew members on the vessel. Those people are being fed and paid and, in fact, most of the crew has been changed out. So it is different people there now than were there in the first incident. Some of the problems that were going on --

THE COURT: I'm glad to hear that, because I really was concerned about their welfare.

MR. HOBSON: Part of the problem back at the time this happened, as Your Honor may know, there was a gigantic earthquake in Sakhalin where the owners are located. They lost all communication, hundreds of oil wells. They lost miles and miles of pipeline. They just couldn't do anything at that time. Plus they were, of course, depending on this Glenmore outfit who has fled the scene now that was supposed to be furnishing everything to them. But that situation is no longer a concern to anyone. In fact, Captain Bonarenko, who was on the vessel, has now gone back to Sakhalin. There is a new captain on board.

Of course, it is our position that there is no -- there can be no valid seizure at this time, and that the current order is likewise invalid. Mr. Franco said he -- claims he never asked for that order to be issued, although I think that the record of the hearing on June 14th shows that he made an oral request for that at the hearing.

THE COURT: I'm looking at the minutes of that meeting right now and that's true.

MR. HOBSON: He doesn't want this order to remain in effect, and, Judge, we have gotten a demand from Brown & Root for $15,000 --

THE COURT: $15,800

MR. HOBSON: Well, you know more than I do, perhaps.

THE COURT: I've got a copy of the facts.

MR. HOBSON: --docking fees from June 14th through August 31st. Presumably there is some number of thousands more than that since August 31st and it is ongoing. But if Mr. Franco doesn't want this order to stay in effect and we don't either -- I think Mr. Franco doesn't want to pay that $15,000 -- then I suggest that Your Honor could just release the order.

MR. FRANCO: May I respond, Judge?

THE COURT: Sure.

MR. FRANCO: Your Honor, the motion for seizure that we originally filed when we intervened asked the Court to judicially seize the vessel. The Court did not act on that motion and, in fact, declined to act on it at the time because of the status of the crew and the concern of what would be the effect of this on the crew if it did judicially seize the vessel. So the Court decided and suggested on its own that the best thing to do would be to maintain the status quo until -- and I just went through all of this when I submitted the opposition to the mandamus yesterday.

The way the proceeding went down was we found out that the crew might experience some problem -- had experienced some problem in not being fed and provided with necessaries, and there had been some crimes that had been committed by the crew. And we were concerned with leaving

them on the vessel. On the other hand, we found out at the hearing that if the captain went back to Russia without the vessel, he could get into some criminal trouble. So the Court was concerned of allowing us to judicially seize the vessel at that time and repatriate the crew. So the Court decided on its own suggestion -- in fact, I remember the statement, I think I know what I'm going to do -- to render the order that it did.

I have always requested seizure. I still request seizure. And I'd like the vessel to be seized on my behalf. The whole question is whether -- that is going to be determined on the 12th is whether the law allows me to seize it or not. So it is not fair to say that I'm the one who requested the order and that I'm the one who would require it to be released or want it to be released. If the Judge releases -- if Your Honor releases the order of the 14th of June, then I would ask that he seize the vessel pursuant to my motion to seize it.

So I want the vessel seized and I'll tell you why I want it seized.

THE COURT: I don't want to get into that. Let me back up a second. Are you saying that you didn't want me to maintain this vessel in the jurisdiction of this Court?

MR. FRANCO: I absolutely did.

THE COURT: Who did you think was going to pay for that?

MR. FRANCO: I wasn't aware at the time that there were any costs for that. We were being told at the time two things, that there were no charges -- we were unaware that there were any charges at that time -- and that the vessel couldn't move. And that is another question I had. We were told at that hearing that the vessel could not move. And I don't know

whether it can move now or not, but that was another reason why the Court decided to leave it where it was.

THE COURT: There is some truth to that. I recall that quite clearly.

. . .

THE COURT: Then let's get back to the original question. Can that vessel be moved to another location that we can let Brown & Root sell their property?

MR. HOBSON: Judge, this is Neal Hobson. The vessel can be towed to another location.

THE COURT: Mr. Hobson, representing the company, is that what y'all -- do y'all want to have it moved to another location?

MR. HOBSON: Judge, we have a location arranged near Houma, Louisiana where the vessel can be kept without charge and in addition where some repairs, needed repairs, can be made to the crane to make it operable.

MR. OSBORNE: Judge, this is Red Osborn representing Entron. May I address a question to Mr. Hobson?

THE COURT: Sure.

MR. OSBORNE: Neal, if the vessel moves to Houma, doesn't it not take it out of the jurisdiction of the Middle District?

THE COURT: No, it takes it out of the jurisdiction of the Western District and puts it in the Eastern District.

MR. OSBORNE: Would we stipulate to retain jurisdiction with Judge Haik?

MR. HOBSON: I don't think that can be done if the vessel moves.

THE COURT: No problem, then. It is not moving until we have the hearing. And unless someone has a place to put this vessel, I'm going to order that it be taken away from the Brown & Root facility, and I'm going to order all of this to be cast as court costs when the Court makes a determination on what is the best thing to do with this vessel. Okay?

. . .

THE COURT: Well, I can if everybody stipulates to it in writing or stipulates that that vessel would not move until further order of this Court. I'm sure we can fashion something that that could be done. But, you know, smarter minds than mine have made other decisions on occasions and this may be inaccurate. But I would, but you -- we would formulate some type of reasonable agreement between the parties that that could work. Otherwise, I'm going to maintain the jurisdiction of the vessel while it is here, and I'm going to have it moved someplace other than Brown & Root and I'll have it placed somewhere else.

In fact, what I'll do is entertain a motion from one of the other parties finding a location that is within the Western District of Louisiana and I will seize the vessel. That's all. It is as simple as that.

MR. HOBSON: Judge, of course, on seizing the vessel I continue to say that I'm entitled to a hearing and --

THE COURT: I'm going to give you a hearing in October.

MR. HOBSON: I understand that. And at that hearing I've already presented evidence which says the Sovereign Immunity Act says that the vessel cannot be seized in behest [advance] of a final judgment.

THE COURT: That is not the issue we're talking about right now. Okay? You may or may not be correct on that issue, but that is not the issue that we're talking about now. The only issue we're talking about now is what am I going to do with that vessel because I'm going to get it out of Brown & Root. If y'all cannot come up with some type of agreement that I maintain jurisdiction, then I'm going to entertain a motion to be filed as soon as possible to be sent down here and I'm going to seize the vessel and I'm going to maintain it is in this jurisdiction until we can see if these people do or do not have a claim against this vessel to be paid for the work that they've done. That's all.

I may be wrong but right now I'm the only show in town. Okay?

. . .

THE COURT: If it is going to be seized, it is going to be the seizing party, but it will be cast as court cost just like the storage fees with Brown & Root if they are reasonable will be cast as cost costs eventually.

MR. HOBSON: Mr. Franco has already taken the position for his client that he's not responsible for putting up any costs.

MR. FRANCO: That is not completely accurate, Your Honor.

THE COURT: I heard what you said. I'm not worried about that.

MR. FRANCO: Yes, sir.

THE COURT: The bottom line is, Mr. Franco, is this location within the Western District of Louisiana and do you

want to go ahead and reurge your prior motion so we can seize it and have it moved so these people can sell their property?

MR. FRANCO: I do if Your Honor is going to lift the other order, that's for sure. I cannot let the vessel flee the jurisdiction, Your Honor. I have no remedy.

THE COURT: Then let's do this.

MR. FRANCO: Your Honor, this is Phil Franco again. My motion to seize is pending. Can we -- if we went forward, could we not just do it on that motion?

THE COURT: Sure, we could.

MR. FRANCO: That motion includes a motion to appoint a substitute custodian and to move the vessel.

THE COURT: All right.

MR. FRANCO: And I believe -- let me look at my motion real quickly because I believe it says that that substitute custodian is within the district. I'd be surprised if it wasn't. I have it right in front of me.

THE COURT: I don't want to do that today because I would like to give Mr. Hobson the opportunity to talk to his client without waiving his right to objecting to the Court's rulings thus far, and certainly preserving his right to appeal that he already has to the Fifth Circuit.

If that could be worked out where it could be agreed upon and if he can begin to have his vessel being repaired properly, then everybody would be in better shape, I think, down the line. And I don't want to prevent that from happening.

But, Mr. Hobson, if that is not a likelihood between now and Monday, then I'd just as soon go ahead and sign it.

MR. FRANCO: Your Honor, if there is any question, what I might suggest is perhaps we could get another

conference call before the Judge makes a definite decision in the event we can't agree. If necessary, we'll have Mr. Cheramie as part of the phone call.

THE COURT: Why don't we set it up now. 11:00 Monday morning. I think I'm clear. 11:00 Monday morning.

MR. OSBORNE: I'm available.

MR. FRANCO: I am, too, Your Honor. This is Phil Franco. That is the 25th, correct.

THE COURT: Right.

MR. DARTEZ: Both Allan Durand I will be available.

MR. HOBSON: I'll be available.

THE COURT: Okay.

MR. HOBSON Judge, if we are going to talk about seizure, are we going to have a hearing and a decision on my claim of immunity?

THE COURT: Yes. October 12th.

MR. HOBSON: If Your Honor is considering the possibility of seizing on Monday, I would appreciate a hearing on the sovereign immunity on Monday.

THE COURT: I hear you.

MR. FRANCO: Judge, on more question if you have a second?

THE COURT: Uh-huh.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ENTRON, LTD. and ENTRON OFFSHORE (A.P.) PTE., LTD	*	DOCKET NUMBER
	*	95-CV-460
	*	
VERSUS	*	
	*	
CRANE VESSEL TITAN 5, in re, and SAKHALIN OFFSHORE CONTRACTORS LTD., in personam	*	

* *

CERTIFICATE OF REPORTER

I, Mary V. Thompson, Official Court Reporter for the United States District Court, Western District of Louisiana, do hereby certify that the foregoing 28 pages are a true and accurate transcript of the proceedings had in this matter, as hereabove set forth, and that I have no interest of any nature whatsoever regarding the ultimate disposition of this litigation.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conferences of the United States.

_____

MARY V. THOMSON, RPR
Official Court Reporter

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ENTRON, LTD. and ENTRON	*	CIVIL ACTION
OFFSHORE (A.P.) PTE., LTD	*	NO. 5-0460
	*	
VERSUS	*	September 25, 1995
	*	11:00 a.m.
CRANE VESSEL TITAN 5,	*	
in rem, and SAKHALIN	*	
OFFSHORE CONTRACTORS,	*	
LTD., in personam	*	Lafayette, Louisiana

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REPORTER'S OFFICIAL TRANSCRIPT OF
HEARING TO DETERMINE FEASIBILITY OF SEIZURE
AND MOVING OF VESSEL
BEFORE THE HONORABLE RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

MARY V. THOMPSON
OFFICIAL COURT REPORTER
161 FEDERAL BUILDING
705 JEFFERSON STREET
LAFAYETTE, LOUISIANA 70501

APPEARANCES

FOR ENTRON, ET AL:	By: RAYMOND A. OSBORN, JR. P.O. Box 99 Gretna, LA 70054
FOR OIL SERVICES & TRADING, INC.:	Adams & Reese By: PHILIP A. FRANCO 4500 One Shell Square New Orleans, LA 70139
FOR FAR EASTERN MARINE, ET AL:	Milling, Benson, Woodward, Hillyer Pierson & Miller By:NEALHOBSONandBENSCHUPP 909 Poydras Street, Suite 2300 New Orleans, Louisiana 70112
FOR DOUBLE EAGLE MARINE, ET AL:	Perrin, Landry, DeLaunay & Durand By: ALLAN DURAND 225 LaRue France Lafayette, LA 70508
FOR CONTINENTAL MACHINE CO.:	Smith, Martin, Shields & Mott By: STEPHEN H. SHAPIRO 700 Camp Street New Orleans, Louisiana 70130
FOR BRIDON ELM, ET AL:	Sessions & Fishman By: BRAD A. ADAMS 201 St. Charles Avenue Suite 3500 New Orleans, Louisiana 70170

PROCEEDINGS

THE COURT: Were y'all able to see if you could resolve your issue, Mr. Hobson?

MR. HOBSON: Judge, I have not received any word back from my client. We had a great deal of trouble getting faxes through to Sakhalin for some reason, and, of course, they're closed for the day over there now. My fax eventually went through, but I don't believe that they got it in time to respond, particularly since they always need to translate things in-house before they can respond.

THE COURT: You mean you need someone to translate it from English to Russian so they can properly understand?

MR. HOBSON: That's correct, Judge. They have their own interpreters in-house. I'm also working with an interpreter in the States and he also was attempting to reach them beginning Thursday night and was unable to get through as well.

THE COURT: Okay. No, problem. Let me state a couple of preliminary things. I do have a complimentary copy of the mandamus that went to the Fifth Circuit. Let me just clear one thing up. It says on Page 13, the second paragraph, the District Court for reasons unknown on August 1st, 1995 postponed the hearing on the motion to arrest the TITAN 5 and FEMCO's opposition based on FFIA until October 12th, 1995. In case you didn't read the minute entry, Mr. Hobson, I made it very, very clear the reason I did continue it. Number one, I continued it the first time at your request. Number tow, I continued --

MR. HOBSON: I think that is clear from what is in that petition for mandamus.

THE COURT: Okay. The second thing is that the second time I continued it is because I received all of these documents and memos two days before the hearing, which was unacceptable. So I just want to clear that up. The reason should be very clear, and you should have known very clearly why I bumped this thing back. The first time at your request; the second time is because I received the documents in far too little time to prepare for a hearing. And I certainly would want the other side, that if they had the Russian to English translation, they may want to have someone translate it for themselves to see if in fact and indeed the translation were accurate. Those were the reasons. So just so we have that clear.

And with that let me make a couple of other statements here. We have Document Number 42 which is the motion -- excuse, me Document Number 35, the motion by Far East to vacate the order, which is Order Number -- the Order of the Court in which we held the vessel. I'm going to grant that motion, Mr. Hobson. I'm going to go ahead and vacate the previous order of the Court.

I'm going to also -- I have all your memorandums, gentlemen, and I'm doing this based on the memorandums so that everyone is very clear of what is going on and what I'm doing. So the first thing I'm going to do is grant the motion by Far East to vacate the Court's prior order dated August 1 of '95. I think that is -- no, that is not the date of the order. June 14th I think is the date of the order. So I'm going to grant that motion and vacate the order.

The second thing I'm going to do, there is a motion by Oil Services & Trading to arrest the vessel. I'm going to grant that motion.

The third thing I'm going to do is I'm going to appoint a substitute custodian as in Document Number 25, which is the motion by Oil Services & Trading to substitute custodian. And do you have a custodian, Mr. Franco?

MR. FRANCO: Yes, sir, we do, the gentleman that I referred to in our last conference, Mr. Charamie's company. The official name of the company is -- I'm looking at my motion right now. I'll tell you -- Ocean Marine Contractors, Inc.

THE COURT: All right. I'm going to grant the substitution of that custodian to that company. I will not, however, remove the crew. I think the crew needs to remain because there is some equipment, as pointed out by Mr. Hobson and others, that is -- may or may not be something that anyone else can handle, and I think this crew wants to remain with that vessel until we resolve the other issues.

The next thing I'm going to do is deny the motion by Far East -- that is Document Number 42 -- to dismiss for insufficient service of process. And the other -- only other motion still outstanding I don't have a copy of it because I think that entire record has gone up to the Fifth Circuit. This is another motion by Far East to dismiss complaints of interventions. I don't have that. I haven't seen that.

And this will obviate the requirement of the hearing on October 12th because I've just ruled on the motions after reviewing the entirety of the motions as well as the memorandums in support of those motions.

MR. FRANCO: What was -- you cut out on me a little bit when you were discussing the motion for -- to dismiss for service of process. What did you do on that?

THE COURT: I denied that motion.

MR. FRANCO: Okay.

MR. ADAMS: Your Honor, this is Brad Adams. There was motion to dismiss for insufficient service of process -- there were two of them, one for some other intervenors and then one for L&L, Seabulk, Bridon, and Versabar. I think that is the one that you -- that's the later one, so that is probably the one you are not ruling on. I had some discussions with Neal Hobson early on, that I was not going to serve my interventions until such time as the motion -- the sovereign immunity defense was ruled upon. I think Neal explained to me he had filed that just in case so there was no misrepresentations of a waiver or anything like that. I take that as being true. However, you know, in terms -- in terms of the motion for insufficiency of service of process against my four clients, I'm going to have them served this week and take care of all that stuff and hopefully the Court will deny that motion also.

THE COURT: As soon as I see them, I'll be able to rule on them. Thank you very much, guys. I'll see y'all later.

MR. HOBSON: This is Neal Hobson. Could I ask you to suspend you motion -- your order of arrest so that we can take an appeal to the Fifth Circuit?

THE COURT: Sure, you can ask me to do that, but I'm not going to do it.

Thank you, gentlemen.

MR. FRANCO: Judge, I'm sorry. This is Phil Franco. All these orders -- I just want to make sure they don't move the vessel before the Marshal goes out with the order because you're signing the motion to arrest which means the warrant will be issued and he will serve it on the vessel. I just want to make sure the vessel won't be moved so we can set this procedure up. I understand your intention is not to allow the

vessel to move outside of your jurisdiction. I want to make sure that doesn't happen in the interim.

THE COURT: It better not. I think everybody should be very clear on that, that will not happen in the interim. That certainly is not the intent. The intent is to move it only because the facility where it is being kept right now is selling their properties and they requested that it be moved. I will file the amount of their -- I'm going to call it a lien for lack of a better term right now, file that into the record of this Court.

Thank you.

MR. HOBSON: Have these proceedings been under--

THE COURT: This --

MR. HOBSON: Has Your Honor had a court reporter taking down this proceeding as well?

THE COURT: Absolutely.

MR. HOBSON: Very good. Thank you.

(End of Proceedings.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ENTRON, LTD. and ENTRON OFFSHORE (A.P.) PTE., LTD	*	CIVIL ACTION NO. 5-0460
VERSUS	*	September 25, 1995 11:00 a.m.
CRANE VESSEL TITAN 5, in rem, and SAKHALIN OFFSHORE CONTRACTORS, LTD., in personam	*	Lafayette,Louisiana

****

CERTIFICATE OF REPORTER

I, Mary V. Thompson, Official Court Reporter for the United States District Court, Western District of Louisiana, do hereby certify that the foregoing 8 pages are a true and accurate transcript of the proceedings had in this matter, as hereabove set forth, and that I have no interest of any nature whatsoever regarding the ultimate disposition of this litigation.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ MARY V. THOMPSON
MARY V. THOMPSON, RPR
Official Court Reporter

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Date: September 25, 1995

PRESENT: HON. RICHARD T. HAIK, SR., JUDGE Presiding

Mary V. Thompson , Court Reporter

Rita V. Watkins , Minute Clerk

Court Opened:11:00A.M. Court Adjourned 11:20A.M.

MINUTES OF COURT

CASE CALLED FOR:

_X_ Hearing on Motions via telephone

VERDICT, RULING, COMMENTS:

Motion to vacate order [35] filed by Far Eastern Marine, considered submitted and GRANTED.

Motion for arrest of vessel [28] filed by Oil Services & Trading, considered submitted and GRANTED.

Motion for appointment of substantive custodian, to allow movement of defendant vessel and to remove the crew [29] filed by Oil Services & Trading, considered submitted and GRANTED as to appointment of substitute custodian and to allow movement of defendant vessel; DENIED as to removal of the crew.

Motion to dismiss for insufficient service of process [42] filed by Far Eastern Marine, considered submitted and DENIED.

U. S. COURT OF APPEALS
FILED
OCT 03 1995
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30908 & 95-30993

IN RE: CRANE VESSEL TITAN 5, its engines, tackles, etc., in rem and FAR EASTERN MARINE EXPLORATION DRILLING COMPANY,

Petitioners,

Petitions for Writ of Mandamus and/or Prohibition to the United States District Court for the Western District of Louisiana, Lafayette

---

TOGETHER WITH

No. 95-30826

ENTRON, LTD. ET AL,

Plaintiffs-Appellees

v.

CRANE VESSEL TITAN 5, in rem, and SAKHALIN OFFSHORE CONTRACTORS, LTD, in personam,

Defendants-Appellants.

Emergency Motions to Stay, Recall, and/or Vacate

Court Orders Restraining the Movement of the Titan 5 Accompanying Appeal from the United States District Court for the Western District of Louisiana, Lafayette

---

Before HIGGINBOTHAM, DUHÉ, and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petitions for writ of mandamus and/or prohibition, filed on September 13 and October 2, are DENIED without prejudice to renewal after the district court's October 12, 1995 hearing.

Insofar as our appellate jurisdiction has been properly invoked, we remand the case to the district court for further proceedings consistent with this order.

To the extent it has not done so already, the district court at the hearing may wish to make findings or fact and conclusions of law concerning the following issues:

1. Whether the Titan 5 is immune from pre-judgment seizure under the Foreign Sovereign Immunities Act.
2. The applicability of and compliance with the notice and valuation provisions contained in 28 U.S.C. §1605(b-c).
3. The legal significance, with regard to notice and the opportunity for a hearing, of the presence of the Titan 5's Russian-speaking captain at the hearing held on June 14.

It is further ordered that all other motions currently pending before this court in this case are DENIED.

From the state of the record before us, we are unable to determine whether the district court has cancelled the hearing scheduled for October 12. In this regard, we refer the court to Supplemental Admiralty Rule E(4)(f).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

ENTRON, LTD. and ENTRON OFFSHORE (A.P.) PTE., LTD. *

CIVIL ACTION 95-0460 * **SECTION L-O**

Versus * **JUDGE HAIK**

CRANE VESSEL TITAN 5, *in rem*, and SAKHALIN OFFSHORE CONTRACTORS, LTD., *in personam* *

* *

ORDER

An Escrow Agreement establishing an escrow fund of $1,500,000.00 having been duly executed, approved, and filed in the above-entitled action for the purpose of securing the release of the Crane Vessel TITAN 5 arrested by virtue of process in this action and Whitney National Bank, as Escrow Agent, having acknowledged receipt of the Escrow Fund and of the Acceptance Fee.

IT IS HEREBY ORDERED that the Escrow Agreement be approved and that Whitney National Bank be approved as Escrow Agent, subject to the further order of this Court;

IT IS FURTHER ORDERED that the United States Marshal release such Vessel forthwith to the Far Eastern Marine Exploration Drilling Company, claimant to the Crane Vessel TITAN 5.

THUS DONE AND SIGNED THIS 28th day of February, 1996 in Lafayette, Louisiana.

/s/ Richard Haik
UNITED STATES DISTRICT JUDGE

ESCROW AGREEMENT

This **ESCROW AGREEMENT** is entered into this twenty-third day of February, 1996, by and among Far Eastern Marine Exploration Drilling Company, a company organized and existing pursuant to the laws of Sakhalin, in the Russian Federation, ("FEMCO"), (" Principal") and Entron, Ltd., Entron Offshore (A.P.) PTE, Oil Services & Trading, Inc.,Double Eagle Marine, Inc., Inland Marine Service, Inc., Tri-Gas, Inc., L&L Oil Company, Inc., Versabar, Inc., Seabulk Offshore, Inc., Bridon Elm, Inc., Coral Marine Services, Inc., King Trucking, Inc., Continental Machine Company, Inc., Brown & Root, Inc., Geomatics B. V. Engineering & Consultancy (Geomatic), ("whether one or more, Lien Claimants") and Whitney National Bank, a national banking association, as escrow agent ("Escrow Agent");

WITNESSETH:

WHEREAS, the Principal has agreed to establish an escrow account with Escrow Agent on the terms and conditions set forth herein, and Escrow Agent has agreed to the terms hereof:

NOW, THEREFORE, in consideration of the premises herein, the parties hereto agree as follows:

1. **ESTABLISHMENT OF ESCROW FUND.** FEMCO shall deliver to Escrow Agent the sum of One Million Five Hundred, and One Thousand ($1,501,000.00) dollars to be designated the "TITAN 5 Lien Claimant Escrow Account" (the "Escrow Fund"). Except as provided in Paragraph 8, the balance shall be paid into the Escrow Fund bank account being Account No. 108413014 at Whitney National Bank. The Escrow Agent shall administer the Escrow Fund under these special terms and conditions: The Escrow Fund shall be held

and disbursed pursuant to the orders of the United States District Court from the Western District of Louisiana, Lafayette, Louisiana, No. 95-0460 entitled Entron, Ltd. and Entron Offshore (A.P.) PTE., Ltd. v. Crane Vessel TITAN 5, *in rem*, and Sakhalin Offshore Contractors, Ltd., *in personam* United States District Court, Western District of Louisiana, Civil Action No. 95-0460 (hereafter, the "Court").

2. **INVESTMENT OF ESCROW FUND**. Unless otherwise directed in writing by the Principal and the Lien Claimants, Escrow Agent shall deposit or invest for the benefit of FEMCO and the Lien Claimants all of the cash in the Escrow Fund in United States Treasury Bills and United States Treasury Notes having a maturity date not more than one year from the date of purchase at the discretion of Escrow Agent. Because such securities can only be purchased in specified denominations, any excess monies in the Escrow Fund that are not sufficient to purchase a U.S. government security shall be invested in one or more mutual fund, money market fund or common trust fund selected by Escrow Agent. Administrative fees may be accepted by Escrow Agent in its capacity as such from such mutual fund companies as a result of such investment.

3. **TERM OF AGREEMENT.** For a period commencing on the date hereof and terminating no later than December 31, 1999, the Escrow Agent agrees to hold the Escrow Fund and to disburse the Escrow Fund in accordance with the terms hereof. If the Court has not instructed Escrow Agent to distribute the Escrow Fund on or before December 31, 1999, and no Notice has been received by Escrow Agent of a dispute concerning distribution of the Escrow Fund, and if the

said date of December 31, 1999 has not been extended by joint agreement of the parties approved by the Court, the Escrow Agent shall turn over the Escrow Fund, less deduction for fees and expenses of the Escrow Agent as provided hereafter, to the Clerk of the United States District Court for the Western District of Louisiana, notifying FEMCO and the Lien Claimants to appear and claim such amounts.

4. **DISTRIBUTIONS OF ESCROW FUND.** Escrow Agent shall make distributions from the Escrow Fund only upon a written instruction contained in a judgment of the Court which has become final or upon the joint written agreement of FEMCO and all the Lien Claimants through their authorized representative or counsel of record. Such Order, Judgment or Agreement shall contain distribution and delivery instructions to Escrow Agent. Escrow Agent may rely upon representations by Neal D. Hobson of Milling, Benson, Woodward, Hillyer, Pierson & Miller, L.L.P. that an Order or Judgment of the Court providing instructions to the Escrow Agent has become final. Distributions shall be made within a reasonable time after Escrow Agent's receipt of such instructions, taking into account the time required to liquidate the invested Escrow Fund or a portion thereof. Specifically, no distribution will be made on the same day notice is given to Escrow Agent if said instructions for disbursement are received after 9:00 A.M.

5. **AMENDMENTS.** This agreement may be amended or modified at any time in any or all respects, but only by an instrument in writing executed by all of the parties hereto and approved by the Court.

6. **NOTICES.** Any notice, delivery, communication, request, reply or advice (herein collectively, "Notice") in this Agreement provided or permitted to be given or made by any party to another must be in writing and may be given or served by depositing the same in the United States Mail, postage prepaid and registered or certified with return receipt requested, or by delivering the same to the address of the person or entity to receive such Notice. Notice deposited in the mail in the manner hereinabove described shall be effective at the time of receipt. For purposes of notice, the addresses of the parties shall, until changed as hereinafter provided, be as follows:

If to the Escrow Agent:
Whitney National Bank
Trust Department- Suite 206
228 St. Charles Avenue
New Orleans, Louisiana 70130
Attention: Mr. Patrick M. Kingsmill

or at such other address as the Escrow Agent may have advised each of the parties hereto by Notice in writing;

If to FEMCO:
Neal D. Hobson, Esquire
Milling, Benson, Woodward, Hillyer
Pierson & Miller, L.L.P.
909 Poydras Street, Suite 2300
New Orleans, Louisiana 70112-1017
Tax I.D. # 72-0934026

or at such other United States address as FEMCO may have advised each of the parties hereto by Notice in writing in the manner provided herein (it being understood that FEMCO shall maintain Neal D. Hobson, Esquire as its agent or substitute

another U.S. citizen as its agent, failing which Escrow Agent shall not be obligated to provide notice to FEMCO hereunder); and

If to the Lien Claimants:
OIL SERVICES AND TRADING COMPANY, INC.
Philip A. Franco, Esquire
Adams & Reese
4500 One Shell Square
701 Poydras Street
New Orleans, Louisiana 70139
Tax I.D. # 74-1848982
ENTRON, LTD.
ENTRON OFFSHORE (A.P.) PTE., LTD.
R. A. Osborn, Jr., Esq.
235 Derbigny Street, Suite 201
Gretna, LA 70054-0099
Tax I.D. # 72-1181510

DOUBLE EAGLE MARINE, INC.
INLAND MARINE SERVICE, INC.
Allan L. Durand, Esq.
Perrin Landry et al
P. O. Box 53597
Lafayette, LA 70505
Tax I.D. #72-0922794 & 72-0898253
TRI-GAS, INC.
Gus David Oppermann, V, Esq.
Monica A. Fekete, Esq.
Brown, Sims, Wise & White
2000 Post Oak Blvd. 21st Floor
Houston, Texas 77056-4496
Tax I.D. # 7424603540
L&L OIL COMPANY, INC. -
No. 72-0491840
VERSABAR, INC. - No. 72-0926021
SEABULK OFFSHORE, INC. -
No. 65-0156025
BRIDON ELM, INC. - No. 72-1671279
KING TRUCKING, INC. - No. 72-0491840
CORAL MARINE SERVICES, INC. -
No. 72-1010002
Brad A. Adams, Esq.
201 St. Charles Avenue
Suite 3500
New Orleans, LA 70170
CONTINENTAL MACHINE COMPANY, INC.
Daryl Glorioso, Esq.

700 Camp Street
New Orleans, LA 70130
BROWN & ROOT, INC.
R. Keith Jarrett, Esq.
David L. Reisman, Esq.
Liskow & Lewis
One Shell Square, 701 Poydras Street
Suite 5000
New Orleans, LA 70139-5099
Tax I.D. # 76-0288298
GEOMATIC B. V. ENGINEERING & CONSULTANCY
Gregory M. Sullivan, Esq.
Laura W. Doerre, Esq.
Mayor, Day, Caldwell & Keeton, L.L.P.
700 Louisiana Avenue, Suite 1900
Houston, Texas 77002-2778
and
Lawrence E. Abbott, Esq.
Deborah D. Kuchler, Esq.
Abbott, Simses, Album, Knister & Baynham
Suite 200
400 Lafayette Street
New Orleans, Louisiana 70130
Tax I.D. #76-0004006

or at such other address as each may have advised each of the parties hereto by Notice in writing.

7. **ESCROW AGENT**. Escrow Agent acts hereunder solely as a depository, and the responsibility of the Escrow Agent extends only to the duties affirmatively stated in this

Agreement and to the exercise of ordinary diligence. No implied duties or obligations of Escrow Agent shall be read into this Escrow Agreement, and Escrow Agent shall not in any event be required to construe or determine the rights of any party under this Agreement.

Escrow Agent shall in no way be responsible for, nor shall it have any duty to notify any party hereto or any other party interested in this Escrow Agreement of any payment required or maturity occurring under this Escrow Agreement or under the terms of any instrument deposited hereunder.

Escrow Agent may consult with its attorneys as to any matters incidental to duties hereunder and shall be fully protected and incur no liability when acting thereon in accordance with the advice of its attorneys, except that with respect to the distribution of funds hereunder, Escrow Agent shall comply with the provisions set out in paragraph four. Escrow Agent shall not be responsible for any act or omission except for actual fraud, dishonesty or bad faith. Escrow Agent may rely upon any such instructions and deliver the Escrow Fund as directed without further investigation. Escrow Agent shall be protected in acting upon any written notice, request, waiver, consent, certificate, receipt, authorization, power of attorney or other paper or document that Escrow Agent in good faith believes to be genuine and what it purports to be, including but not limited to, items directing investment or non-investment of funds, items requesting or authorizing release, disbursement or retainage of the subject matter of Escrow Agreement, and items amending the terms of this Escrow Agreement.

In the event of dispute arising between and/or among any two or more of the parties hereto, or if a claim is asserted with respect to the escrow fund, the Escrow Agent may withhold any requested action until the dispute is amicably resolved. In any event, Escrow Agent reserves the right to deposit all property in its possession in connection with this agreement into the registry of a court of competent jurisdiction in a concursus or other proceeding upon directing Notice to the parties as provided hereinabove and thereby shall be relieved of any further responsibility under this Agreement. The Escrow Agent shall be entitled to reimbursement for all legal fees and costs incurred by it in connection with any concursus, interpleader or other action filed by Escrow Agent hereunder and in connection with any dispute or claim involving the distribution of the Escrow Fund.

Each person comprising Principal hereby jointly, severally, and solidarily agrees to indemnify and hold harmless the Escrow Agent from and against all losses, costs, claims, demands, expenses and damages, and attorneys fees suffered or incurred by Escrow Agent as a result of any litigation or cause of action arising from or in conjunction with this Agreement or involving the subject matter hereof.

If any party to this Agreement is a legal entity other than a natural person, the Escrow Agent may conclusively presume that the undersigned representative of such party has full power and authority to instruct Escrow Agent on behalf of such party unless written notice to the contrary is delivered to Escrow Agent.

8. **COMPENSATION, FEES, ETC**. Escrow Agent shall be entitled to an acceptance fee of $1,000.00 to be paid

from the funds initially being deposited into the Escrow Fund and thereafter an annual service fee of $1,500.00 per year and to reimbursement for its costs and expenses in connection with its performance of services under this agreement (including amounts representing reasonable fees and expenses of Escrow Agent's counsel and accountants). Except for the acceptance fee, payable upon establishment of the Escrow Fund, such compensation, fees, costs and expenses shall be paid from the income earned on the Escrow Fund, but if such amounts are unpaid, in whole or in part, the Escrow Agent shall be entitled to deduct such amounts from the Escrow Fund.

9. **ASSIGNMENT.** No assignment of the rights of any party to this agreement shall be valid and enforceable without the prior written consent of all of the parties hereto.

10. **SUCCESSOR ESCROW AGENT.** Escrow Agent may resign at any time by giving written notice to the other parties hereto, whereupon such parties agree to immediately appoint a successor escrow agent. Until a successor escrow agent has been named and accepts its appointment or until another disposition of the Escrow Fund has been agreed upon by all the parties hereto and approved by the Court, Escrow Agent shall be discharged of all of its duties hereunder save to keep the Escrow Fund whole.

11. **CONTROLLING LAW.** The validity of this Agreement, the construction of its terms and the determination of the rights and duties of the parties hereto shall be governed by and construed in accordance with the laws of the State of Louisiana.

12. **MULTIPLE COUNTERPARTS.** This Escrow Agreement may be executed in multiple counterparts.

PRINCIPAL:

WITNESSES:

FAR EASTERN MARINE
EXPLORATION
DRILLING COMPANY

_____

BY: _____
Neal D. Hobson, Its Attorney

_____

Benjamin O. Schupp, Its Attorney

LIEN CLAIMANTS:

ENTRON, LTD. AND
ENTRON OFFSHORE (A.P.)
PTE., LTD.

BY:_____
R. A. Osborn, Jr., Their Attorney

OIL SERVICES AND TRADING
COMPANY, INC.

BY:_____
Philip A. Franco, Its Attorney
Edward H. Arnold, Its Attorney

L&L OIL COMPANY, INC.;
VERSABAR, INC.;
SEABULK OFFSHORE, INC.;
BRIDON ELM, INC.

BY:_____
Brad A. Adams, Their Attorney

CONTINENTAL MACHINE
COMPANY, INC.

BY:_____
Daryl Glorioso, Its Attorney

DOUBLE EAGLE MARINE, INC.
INLAND MARINE SERVICE, INC.

BY:_____
Allan L. Durand, Their Attorney

TRI-GAS, INC.

BY:_____
Gus David Opperman, V,, Its Attorney

BROWN & ROOT, INC.

BY:_____
R. Keith Jarrett, Its Attorney
David L. Reisman, Its Attorney

GEOMATIC B. V. ENGINEERING
& CONSULTANCY

BY:_____
Gregory M. Sullivan, Its Attorney
Laura W. Doerre, Its Attorney

BY:_____
Lawrence E. Abbott, Its Attorney
Deborah D. Kuchler, Its Attorney

ESCROW AGENT:

WHITNEY NATIONAL BANK

BY: _____

AMENDMENT NO. 1 TO THE ESCROW AGREEMENT

This Amendment No. 1 is made to that certain Escrow Agreement dated February 23, 1996, entered into by and among Far Eastern Marine Exploration Drilling Company ("FEMCO") ("Principal") and Entron, Ltd., Entron Offshore (A.P.) PTE, Oil Services & Trading, Inc., Double Eagle Marine, Inc., Inland Marine Service, Inc., Tri-Gas, Inc., L&L Oil Company, Inc., Versabar, Inc., Seabulk Offshore, Inc., Bridon Elm, Inc., Coral Marine Services, Inc., King Trucking, Inc., Continental Machine Company, Inc., Brown & Root, Inc., Geomatic B. V. Engineering & Consultancy (Geomatic) ("whether one or more, Lien Claimants") and Whitney National Bank, a national banking association, as escrow agent ("Escrow Agent"), who agree as follows:

WHEREAS,Ocean Marine Contractors, Inc. ("Ocean Marine") has moved to intervene in suit no. 95-0460 entitled *Entron, Ltd. and Entron Offshore (A.P.) PTE, Ltd. v. Crane Vessel, TITAN 5, in rem, and Sakhalin Offshore Contractors, Ltd. in personam*, pending in the United States District Court for the Western District of Louisiana, and counsel for Principal has been advised that Judge Richard Haik of the Western District of Louisiana requires that Ocean Marine be included in the Escrow Agreement before the Court approves the Escrow Agreement, the Escrow Agent and orders the release of the TITAN 5;

NOW, THEREFORE, in consideration of the premises, Principal, Lien Claimants and Escrow Agent agree as follows:

1. The first paragraph of the Escrow Agreement is amended to read as follows:

This **ESCROW AGREEMENT** is entered into this twenty-third day of February, 1996, by and among Far Eastern Marine Exploration Drilling Company, a company organized and existing pursuant to the laws of Sakhalin, in the Russian Federation, ("FEMCO") , (" Principal") and Entron, Ltd., Entron Offshore (A.P.) PTE, Oil Services & Trading, Inc.,Double Eagle Marine, Inc., Inland Marine Service, Inc., Tri-Gas, Inc., L&L Oil Company, Inc., Versabar, Inc., Seabulk Offshore, Inc., Bridon Elm, Inc., Coral Marine Services, Inc., King Trucking, Inc., Continental Machine Company, Inc., Brown & Root, Inc., Geomatic B. V. Engineering & Consultancy (Geomatic) Ocean Marine Contractors, Inc., ("whether one or more, Lien Claimants") and Whitney National Bank, a national banking association, as escrow agent ("Escrow Agent");

2. Paragraph numbered 6 shall be amended to include the following notice information in the Lien Claimants section:

OCEAN MARINE CONTRACTORS, INC.

John T. Nesser
Nesser, King & LeBlanc
201 St. Charles Avenue
3800 Place St. Charles
New Orleans, LA 70170
Tax I.D. Number #72-1220277

In all other respects, the agreement is ratified and confirmed. On and after the effective date of this amendment, the Escrow Agreement shall mean the Escrow Agreement, as amended by this Amendment No. 1. The parties' signatures below, including the signature of Ocean Marine's attorney,

indicate the parties' acceptance and approval of this amendment as well as the ratification and confirmation of the original Escrow Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment No. 1 to be duly executed as of March ___, 1996.

WITNESSES:

_____

_____

PRINCIPAL:
FAR EASTERN MARINE
EXPLORATION
DRILLING COMPANY

BY: _____
Neal D. Hobson, Its Attorney
Benjamin O. Schupp,
Its Attorney

LIEN CLAIMANTS:

ENTRON, LTD. AND
ENTRON OFFSHORE (A.P.)
PTE., LTD.

BY:_____
R. A. Osborn, Jr., Their Attorney

OIL SERVICES AND
TRADING COMPANY, INC.

BY:_____
Philip A. Franco, Its Attorney
Edward H.Arnold, Its Attorney

L&L OIL COMPANY, INC.;
VERSABAR, INC.;
SEABULK OFFSHORE, INC.;
BRIDON ELM, INC.

BY:_____
Brad A. Adams, Their Attorney

CONTINENTAL MACHINE
COMPANY, INC.

BY:_____
Daryl Glorioso, Its Attorney

DOUBLE EAGLE MARINE,
INC.
INLAND MARINE SERVICE,
INC.

BY:_____
Allan L. Durand, Their Attorney

TRI-GAS, INC.

BY:_____
Gus David Opperman, V,
Its Attorney

BROWN & ROOT, INC.

BY:_____
R. Keith Jarrett, Its Attorney
David L. Reisman, Its Attorney

GEOMATIC B. V.
ENGINEERING
& CONSULTANCY

BY:_____
Gregory M. Sullivan,
Its Attorney
Laura W. Doerre, Its Attorney

BY:_____
Lawrence E. Abbott, Its Attorney
Deborah D. Kuchler, Its Attorney

OCEAN MARINE
CONTRACTORS, INC.

BY: _____
John T. Nesser, Its Attorney
Elizabeth S. Wheeler,
Its Attorney
Jeffrey M. Burmaster,
Its Attorney

ESCROW AGENT:

WHITNEY NATIONAL BANK

BY: _____

MOTION FILED

APR 25 1996

(2)

No. 95-1566

Supreme Court, U.S.
FILED
APR 25 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CRANE VESSEL TITAN 5, *in rem*, and its claimant, FAR EASTERN MARINE EXPLORATION DRILLING COMPANY,

Petitioners,

v.

OIL SERVICES AND TRADING, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CHERNOMORNEFTEGAZ IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JACK G. CARINHAS, JR.
Counsel of Record
302 Kings Highway
Suite 109
Brownsville, TX 78521
(210) 542-9161

Attorney for Amicus Curiae Chernomorneftegaz

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

29 pp

Applicant, Chernomorneftegaz, moves the Court for permission to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by the Crane Vessel TITAN 5 and its Claimant, Far Eastern Marine Exploration Drilling Company (collectively "Petitioners"). Petitioners have given consent to Chernomorneftegaz to file an *amicus* brief. Although requested, some Respondents have declined to consent to the filing of the attached brief.[1] Accordingly, leave to file must be sought pursuant to Rule 37.2 of the Court.

NATURE OF APPLICANT'S INTEREST

Chernomorneftegaz is and has been an instrumentality of the sovereign state of Ukraine since 1991. Prior to 1991, Ukraine was a republic in the Union of Soviet Socialists Republics. State Production Enterprises Chernomorneftegaz is under the direction of Derzkomnaftogazprom which is the Governmental Committee on Oil, Gas and Industry of the Ukraine. Appendix p. 1a.

Chernomorneftegaz is the owner of the Crane Barge TITAN 2, a 19,813 ton vessel which, since April 24, 1995, has been under seizure in the case entitled *S.H.R.M. Catering Services, Inc. v. TITAN 2*, now pending in the United States District Court for the Southern District of Texas, Brownsville Division. Appendix p. 2a and 4a. On May 25, 1995,

---

[1]Counsel for Oil Services and Trading, Inc.; Tri-Gas, Inc.; Ocean Marine Contractors, Inc.; L&L Oil Company, Inc.; Versabar, Inc.; Seabulk Offshore, Inc. and Bridon Elm, Inc. have objected to the filing of an *amicus* Brief by Chernomorneftegaz. Counsel for Continental Machine Company, Inc., Brown & Root, Inc.; Entron, Ltd. and Entron Offshore (A.P.) PTE, Ltd. have no objection to the filing of the brief. No response has been received from counsel from Double Eagle Marine, Inc.; Inland Marine Service, Inc. and Geomatic B.V. Engineering and Consultancy.

Chernomorneftegaz, claimant to the TITAN 2, filed a Motion to Dismiss the complaint of S.H.R.M. Catering Service, Inc. and to dissolve the arrest and attachment of the TITAN 2. No ruling has yet been made with respect to this Motion to Dismiss.

While there are some differences between the TITAN 5 case and the TITAN 2 case, there are fundamental similarities in the two cases, the most significant being that both vessels are owned by foreign sovereigns which are governed by the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq*, (hereinafter "FSIA"), both have been under seizure for many months and many of the same lien claimants have commenced *in rem* actions by arresting the TITAN 5 and the TITAN 2 in violation of the FSIA. In addition, the TITAN 5 and the TITAN 2 were both chartered by Glenmore Heavy Lifting, Ltd. and similarly both terminated the charter party due to non-payment of charter hire. Appendix p. 2a.

As reported by the noted recognized shipping reference, the government of the Ukraine also owns a controlling interest of Black Sea Shipping Company, a shipping line which owns and operates 275 vessels[2], many of which may call at ports in the United States, including ports in the United States Gulf, within the Fifth Circuit. The Fifth Circuit's ruling puts these vessels under constant risk of seizure, in violation of the FSIA's protections, whenever they call in the United States.

This case concerns the interpretation of the Foreign Sovereign Immunities Act. 28 U.S.C. §§1602-1611 (hereinafter "FSIA").

---

[2]World Shipowning Groups, Lloyds of London Press, Ltd. (Ed. 1995) pp. vii-viii. Appendix p. 11a-12a.

REASONS FOR REQUESTING LEAVE TO FILE THIS BRIEF AS *AMICUS CURIAE*

Chernomorneftegaz is seeking to file an *amicus* brief because the decision of the Court below seriously misconstrues the intent, purpose and meaning of §1605 of the FSIA and disregards the terms and provisions of §1609-1610 of the FSIA. As a party with another foreign government owned vessel now under seizure, and because its controlling shareholder, the Government of the Ukraine, owns a majority and controlling interest in at least one other company owning and operating Ukrainian flagged vessels which may call at ports in the United States, Chernomorneftegaz requests the opportunity to make its views on the Foreign Sovereign Immunities Act known to the Court.

Respectfully submitted,

Jack G. Carinhas, Jr.
Counsel of Record
302 Kings Hwy., Suite 109
Brownsville, TX 78521

Attorney for Chernomorneftegaz, Applicant for Leave to File Brief *Amicus Curiae*

/105881

QUESTION OF LAW PRESENTED

Does the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611 (hereinafter "FSIA") permit a maritime lien claimant to arrest in advance of judgment and bring an *in rem* action against a vessel owned by a foreign state?

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Complaint of *S.H.R.M. Catering Services, Inc. v. TITAN* 2 No. B-95-61 S.D. TX. 4a

Excerpt from World Shipowning Groups, Lloyds of London Press, Ltd (Ed.1995) 11a

TABLE OF AUTHORITIES

Cases

S.H.R.M. Catering Services, Inc. v. TITAN 2 No. B-95-61 S.D. TX 1
Stena Rederi AB v. Comision de Contractors del Comite, 923 F.2d 380 (5th Cir. 1991) 3
United States v. Moats, 961 F.2d 1198 (5th Cir. 1992) 3

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Arbitral Awards, 1986 Hearings on H.R. 3106, 3137, 4342, and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong. 2d Sess. 157 (1986) (Statement of William R. Dorsey, III, Maritime Law Association). 7
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World Shipowning Groups, 1995 Lloyds of London Press, Ltd. pp. vii-viii. 2,3
Schoenbaum, Admiralty and Maritime Law *Admiralty and Maritime Law*, at 469 (2d Ed. 1994) . 7
1 Benedict, Admiralty §130, p. 8-60 (7th Ed. (rev.) .. 7

The parties to these proceedings may be found in the original Petition for Writ of Certiorari filed by Far Eastern Marine Exploration Drilling Company.

Chernomorneftegaz, a Ukrainian government owned agency and/or instrumentality and owner of the Crane Vessel TITAN 2, respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by the Crane Vessel TITAN 5 and its claimant, Far Eastern Marine Exploration Drilling Company ("Petitioners").

INTEREST OF *AMICUS CURIAE*

Chernomorneftegaz is and has been an instrumentality of the sovereign state of Ukraine since 1991. Prior to 1991, Ukraine was a republic in the Union of Soviet Socialists Republics. State production Enterprises Chernomorneftegaz is under the direction of Derzkomnaftogazprom which is the Governmental Committee on Oil, Gas and Industry of the Ukraine. Appendix p. 1a.

Chernomorneftegaz is the owner of the Crane Barge TITAN 2, a 19,813 ton vessel which, since April 24, 1995, has been under seizure in the case entitled *S.H.R.M. Catering Services, Inc. v. TITAN 2*, now pending in the United States District Court for the Southern District of Texas, Brownsville Division. Appendix p. 2a and 4a. On May 25, 1995, Chernomorneftegaz, claimant to the TITAN 2, filed a Motion to Dismiss the complaint of S.H.R.M. Catering Service, Inc. and to dissolve the arrest and attachment of the TITAN 2. No ruling has yet been made with respect to this Motion to Dismiss.

While there are some differences between the TITAN 5 case and the TITAN 2 case, there are fundamental similarities in the two cases, the most significant being that both vessels are owned by foreign sovereigns governed by the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq*, (hereinafter

"FSIA"), both have been under seizure for many months and many of the same lien claimants have commenced *in rem* actions by arresting the TITAN 5 and the TITAN 2 in violation of the FSIA. In addition, the TITAN 5 and the TITAN 2 were both chartered by Glenmore Heavy Lifting, Ltd. and similarly both terminated the charter party due to non-payment of charter hire. Appendix p. 2a.

As reported by the noted recognized shipping reference, the government of the Ukraine also owns a controlling interest of Black Sea Shipping Company, a shipping line which owns and operates 275 vessels[3], many of which may call at ports in the United States, including ports in the United States Gulf, within the Fifth Circuit. The Fifth Circuit's ruling puts these vessels under constant risk of seizure, in violation of the FSIA's protections, whenever they call in the United States.

This case concerns the interpretation of the Foreign Sovereign Immunities Act. 28 U.S.C. §§1602-1611 (hereinafter "FSIA").

SUMMARY OF REASONS FOR GRANTING THE WRIT

The TITAN 2, a vessel owned by a "foreign state" as that term is defined in the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §1602 et seq., is under seizure in case No. B-95-61 in the United States District Court for the Southern District of Texas ("The TITAN 2 case").

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[3] Excerpt from World Shipowning Groups, Lloyds Shipowning Groups, 1995 Lloyds of London Press, Ltd. pp. vii-viii. Appendix p. 11a-12a.

Attorneys for the lien claimants in that case have called to the attention of the court the decisions of the district court and of the Fifth Circuit in the TITAN 5 case. While Chernomorneftegaz contends that there are differences in the two cases which make the decision in the TITAN 5 case inapplicable to the TITAN 2 case, if the Fifth Circuit decision, which it is submitted is fraught with error, is permitted to stand uncorrected, it may have a substantial adverse effect on Chernomorneftegaz.[4]

Of even more importance is the enormously prejudicial effect of the TITAN 5 decision on other vessels owned and operated by other corporations owned and controlled by the Government of the Ukraine.[5] The adverse impact of this decision upon the Ukraine will be significant. It is respectfully submitted that this Court should act now to correct the error of the Fifth Circuit.

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[4]Chernomorneftegaz contends that they were not involved in commercial activity as that term is used in §1605(b) because there is no connection or nexis between its transaction in chartering the TITAN 2 and Glenmore Heavy Lifting, Ltd.'s activities in operating in the Gulf of Mexico. *Stena Rederi AB v. Comision de Contractors del Comite*, 923 F.2d 380 (5th Cir. 1991) and *United States v. Moats*, 961 F.2d 1198 (5th Cir. 1992).

[5]Another Ukrainian shipping company owns and operates a large number of vessels, many of which may call at U.S. ports. Other foreign sovereigns also own and operate large shipping companies, whose ships may call on U.S. ports. For example Sovcomflot (82 ships); Novorossiysk Shipping (139 ships); Far Eastern Shipping (251 ships); China Ocean Shipping (725 ships); Government of India (461 ships); Polish Steamship (107 ships). World Shipowning Groups, Lloyds of London Press, Ltd. (Ed. 1995), pp. vii-viii. Appendix p. 11a.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE COURTS BELOW ARE IN ERROR

A. THE DECISIONS BELOW MISINTERPRET THE PLAIN LANGUAGE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

In holding that the FSIA permits *in rem* actions against vessels owned by foreign sovereigns, the Fifth Circuit has disregarded the plain language of Section 1609 of the Act. The section provides

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in Section 1610 and 1611 of this Chapter.

28 U.S.C. §1609. Section 1610 provides for arrest of a vessel in only two instances:

1) in connection with the foreclosure of a preferred ship mortgage.

2) if the foreign state has explicitly waived immunity from attachment prior to judgment and the purpose of the attachment is to secure satisfaction of the judgment.

The relevant portions of 28 U.S.C. §1610 are:

(d) The property of a foreign state (as defined in §1603(a) of this chapter used for a commercial activity in the United States shall not be immune from attachment prior to the entry of judgment in any action brought in a court in the United States or of a State or prior to the elapse of the period of time provided in Subsection (c) of this section if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of foreign states shall not be immune from arrest *in rem*, interlocutory sale, and execution and actions brought to foreclose a preferred mortgage as provided in §1605(d).

Neither of these exceptions is applicable to this case. There is no suggestion in either the TITAN 5 case or the TITAN 2 case that the purpose of the attachment was to secure satisfaction of the judgment to be rendered, nor that the foreign sovereign involved has explicitly waived its immunity. The case does not involve a ship mortgage, preferred or otherwise. Thus, the plain language of the FSIA prohibits arrest of the TITAN 5 in this case.

In holding that §1605(b) of the FSIA permits actions *in rem*, the court below indicated that the specific provisions of §1605(b) took precedence over the general provisions of §§1609 and 1610. Section 1605(b) simply states that a claim may be brought against the owner if the vessel is involved in commercial activity in the United States; it does not grant any right to arrest a vessel, or to seize other property of a foreign state. On the other hand, §1609 explicitly forbids arrest of property owned by a foreign sovereign which would, of course, include a vessel. Simply put, §1605(b) provides a specific exception to the general rule of *foreign state* immunity set forth in §1604, while §1610 provides specific exceptions to the general rule of immunity from arrest or seizure of the *property* of a foreign state set forth in §1609. At issue here is the *property* of a foreign state (the TITAN 5). Since the exceptions of §1610 are inapplicable, §1609 controls to bar the prejudgment arrest of the TITAN 5.

It is submitted that the court below has misconstrued the clear meaning of §1605(b). That section provides only that a *foreign state* shall not be immune from the jurisdiction of the Courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien on a vessel or cargo of the foreign state. The section does not state that a vessel owned by the foreign state loses its immunity. The section contemplates only an *in personam* action against a foreign state.

What is contemplated and permitted by Section 1605(b), assuming all its requirements are met, is that an *in personam* cause of action to recover for the amount of a maritime lien may be asserted against the foreign state owner in lieu of the action against the vessel. While the action itself is an *in personam* action against the foreign state, not an *in rem*

action, the case proceeds under the principles of law of an *in rem* case. In other words, the case is a form of substitute *in rem* case.[6]

B. THE DECISIONS BELOW IGNORE THE REPORTED CASE LAW

While this Court is, of course, not bound by decisions of the circuit courts or the district courts, there have been until now, no decisions of this Court dealing with the FSIA. In this circumstance, it is submitted that the decisions of the district courts and circuit courts, while not binding, should be given due consideration by this Court.

As noted in the Petition for Certiorari, all of the cases on this question, except one, have correctly held that the FSIA does not permit *in rem* suits and prejudgment arrests of foreign state-owned vessels in connection therewith. Petition p. 13-14. The current leading treatise on maritime law states, "The FSIA precludes process *in rem* and admiralty attachment." 2 Schoenbaum, *Admiralty and Maritime Law*, at 469 (2d Ed. 1994). See also 1 Benedict, Admiralty §130, p. 8-60 (7th Ed. (rev.)), Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 Tul.L.Rev. 1274, 1314 (1982).

The decisions of the court below ignore the nearly unanimous case law and the leading treatises on maritime law.

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[6]"In light of the significant distinction between *in rem* and *in personam* claims, it is important to make clear that Section 1605(b) cases are substitute *in rem* cases...Arbitral Awards, 1986 Hearings on H.R. 3106, 3137, 4342, and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong. 2d Sess. 157 (1986) (Statement of William R. Dorsey, III, Maritime Law Association).

II. THE VIEWS OF THE UNITED STATES WOULD BE HELPFUL TO THE COURT

It is suggested that the Court request that the Solicitor General submit to this Court the views of the United States in this matter.

CONCLUSION

It is submitted that the petition for a writ of certiorari should be granted.

DATED: April 25, 1996

Respectfully submitted,

Jack G. Carinhas, Jr.
Counsel of Record
302 Kings Hwy., Suite 109
Brownsville, TX 78521

Attorney for Chernomorneftegaz, Applicant for Leave to File Brief *Amicus Curiae*

APPENDIX

AFFIDAVIT

BEFORE ME, the undersigned authority on this day personally appeared NIKOLAY ILNITSKY, who after being duly sworn, declared and stated the following:

1) My name is NIKOLAY ILNITSKY. I am legally competent and qualified to make this affidavit. The factual statements contained in this affidavit are true and based on both my personal knowledge and on the business records of Chernomorneftegaz over which I have custody and control.

2) I am a citizen of the Ukraine where I also reside at Simferopol. I am 53 years old and was born on August 14, 1942. I am currently the Director General of Chernomorneftegaz and have served in that capacity since April 21, 1995. Before serving as Director General I also was the 1st Deputy Director General of Chernomorneftegaz since March 21, 1992.

3) Chernomorneftegaz is and has been an instrumentality of the sovereign state of Ukraine since 1991. Prior to 1991 Ukraine was a republic in the Union of Soviet Socialist Republics. In 1991 Ukraine became an independent sovereign state. State Production Enterprises Chernomorneftegaz is under the direction of Derzkomnaftogazprom which is Governmental Committee on Oil, Gas, and Industry of Ukraine. UTF &PTR is a division of Chernomorneftegaz.

4) The Crane Vessel TITAN 2 is owned by Chernomorneftegaz and sails under the Ukrainian flag.

5) The TITAN 2 is a self-propelled crane vessel that is 124.36 meters long, 54 meters wide and has 19,813 registered ton capacity. The TITAN 2 was built for Chernomorneftegaz in Turku, Finland on January 30, 1985 and registered at the Government of States Registry Book as Number 13 on July 16, 1985. On July 21, 1994 the Crane Vessel TITAN 2 was registered to carry the Ukrainian flag. The Vessel is under the management and operation of UTF &PTR.

6) On July 22, 1994 Chernomorneftegaz entered into a Time Charter Party with Glenmore Heavy Lifting Ltd., a Cyprus corporation, for management and operation of the Crane Vessel TITAN 2.

7) Chernomorneftegaz terminated the charter party effective April 15, 1995 due to violations of the charter and nonpayment of charter hire by Glenmore Heavy Lifting Ltd. The Crane Vessel TITAN 2 is currently under the control of the owner of the vessel Chernomorneftegaz.

8) At no time has Glenmore Heavy Lifting Ltd. owned or had an ownership interest in the Crane Vessel TITAN 2.

9) At no time has Chernomorneftegaz or any of its agencies or divisions owned or had an ownership interest in Glenmore Heavy Lifting Ltd.

10) On April 24, 1995 the TITAN 2 was arrested by the United States Marshal for the Southern District of Texas while undergoing repairs to the crane at Amfels Shipyard. TITAN 2 remains under arrest as of this date.

11) At no time has the Government of the Sovereign State of Ukraine, Derzkomnaftogazprom, Chernomorneftegaz, or

UTF & PTR waived sovereign immunity from lawsuits filed in the United States of America or anywhere else in the world, against them, the Crane Vessel TITAN 2, or any of its property.

FURTHER, AFFIDANT SAITH NOT.

/S/ NIKOLAY ILNITSKY

This twenty second day of May month nineteen ninety five, the city of Simferopol, Crimea, Ukraine, I ISAEVA LARISA GORDEEVNA, Notary Public of the 1-st Simferopol State Notary Office, certify the signature of ILNITSKY NIKOLAY KARLOVICH residing in Simferopol, Kujbysheva 13, apt. 362, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the above instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument. In witness whereof I put my signature and seal.

Registered under the number 1K-2115
Exacted 28000-00 coupons of state duty.
Notary Public - Signature
Seal of the Notary Office.

Stitched, enumerated and
Sealed 2 (two) pages
Notary Public - Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

S.H.R.M. CATERING	§
SERVICES, INC.,	§
Plaintiff	§
VERSUS	§
	§
The TITAN 2, her engines,	§
tackle, apparel, etc., *in rem*	§
Defendant	§

COMPLAINT TO ENFORCE MARITIME LIEN

The Complaint of S.H.R.M. Catering Services, Inc. (hereinafter referred to as "S.H.R.M."), against the TITAN 2, her engines, tackle, apparel, etc., *in rem*, (hereinafter referred to as "Vessel"), respectfully represents:

JURISDICTION

1.

This is an admiralty and maritime claim within the jurisdiction of the United States and this Honorable Court pursuant to 28 U.S.C. §1333 and within the meaning of Rule9(h) of the Federal Rules of Civil Procedure. Plaintiff, alternatively alleges jurisdiction pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 and, upon information and belief, Article 23 of the Convention on the High Seas.

2.

At all material times, plaintiff was and still is a corporation organized under the laws of the State of Louisiana with its principal place of business in Lafayette, Louisiana.

3.

The TITAN 2, is a Catamaran Crane Vessel of foreign registry with the principal dimensions of 456 feet in length and breadth of 178 feet and is presently located at Amfel Shipyard, South Port Road, Brownsville, Texas, in this district and within the jurisdiction of the United States and this Honorable Court. Upon information and belief, the TITAN 2 is owned by Chernomorneftegaz, an industrial enterprise purportedly owned by the government of the Ukraine. At all material times, the TITAN 2 has been engaged in commercial activity.

4.

From October, 1994 through December, 1994, S.H.R.M. provided necessaries to the TITAN 2, consisting of catering services, which services were invoiced to the Vessel's Manager, Glenmore Heavy Lifting Ltd. of Cyprus and which invoices have a balance due and owing in the amount of $87,758.90. An accounts receivable balance reflecting the amount due is attached hereto as Exhibit "A".

5.

Despite amicable demand upon the Vessel for payment of amounts owed for necessaries, the Vessel has not paid those amounts and therefore S.H.R.M. has a maritime lien against the TITAN 2, pursuant to 46 U.S.C.A. §31301, *et seq.*, in the amount of $87,758.90.

6.

Upon information and belief, Glenmore Heavy Lifting Ltd. of Cyprus was the Manager of the Vessel and the charter party has been terminated.

7.

Pursuant to 46 U.S.C.A. §31325 and 28 U.S.C.A. 1605(b)(2), notice of these proceedings must be given to the master or the individual in charge of the Vessel and plaintiff requests that this notice be given to the Vessel's owner, Chernomorneftegaz and the Government of the Ukraine

pursuant to 27 U.S.C.A. 1608, and requests the Court to order such notification to be made by certified mail, delivered to their last known address.

WHEREFORE, plaintiff, S.H.R.M. Catering Services, Inc. prays:

1. That according to the course and practice of this Court, process be issued against the TITAN 2, its engines, anchors, tackle, apparel, etc., and all other necessaries thereunto belonging and appertaining, and that all persons claiming any interest in the said Vessel be duly cited to appear and answer the matters aforesaid, including its Owner, and that the Vessel, its engines, anchors, tackle, apparel, etc., and all other necessaries thereunto belonging and appertaining, be condemned and sold to pay the demands and claims aforesaid with interest, with costs and attorney's fees, and to pay any and all other amounts required to be paid to S.H.R.M. Catering Services, Inc., with interest, costs and attorney's fees; and that S.H.R.M. Catering Services, Inc. have such other further relief as the law and justice may entitle it to receive.

2. That the maritime lien on the TITAN 2 in favor of S.H.R.M. Catering Services, Inc. be declared to be a valid and subsisting lien upon the TITAN 2, its engines, anchors, tackle, apparel, etc., and all the necessaries thereunto belonging and appertaining, in favor of S.H.R.M. Catering Services, Inc., prior and superior to the interest, liens or claims of any and all persons, firms or corporations whatsoever, except such persons, firms or corporation as may hold Preferred Maritime Liens on the TITAN 2.

3. That it be declared that any and all persons, firms or corporations claiming any interest in the TITAN 2, are forever barred and foreclosed of and from all rights of equity or redemption or claims of, in or to the TITAN 2, its engines, anchors, tackle, apparel, etc., and all the necessaries thereunto belonging and appertaining.

4. That pursuant to 46 U.S.C.A. §31325, notice of these proceedings must be given to the master or the individual in charge of the Vessel plaintiff requests the Court to order such notification to be made to such persons by certified mail, delivered to their last known address.

5. That pursuant to 28 U.S.C.A. §1608, Chernomorneftegaz and the Government of Ukraine be given notice and that the Court order that the Clerk of Court provide the notice as set forth in 28 U.S.C.A. 1608 (a)(3).

6. The judgment be issued in favor of S.H.R.M. Catering Services, Inc. and against the TITAN 2, *in rem*, in the amount of $87,758.90, plus interest, plus all costs incurred in connection with these proceedings, and reasonable attorney's fees; and

7. For such other and further relief to which it may be entitled in law and equity.

Respectfully submitted,
SANCHEZ,WHITTING&JANIS

/s/

DENNIS SANCHEZ, Fed. #1594
State Bar #17569600
100 N. Expressway 83
Brownsville, TX 78520
(210) 546-3731

OF COUNSEL
ADAMS AND REESE
E.H. Arnold, Fed. #17158
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone (504) 581-3234
Attorneys for S.H.R.M. Catering Services, Inc.

PLEASE SERVE WRIT OF ARREST AND SEIZE THE TITAN 2 at:

Amfel Shipyard
South Port Road
Brownsville, Texas 78523

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

S.H.R.M. CATERING	§
SERVICES, INC.,	§
Plaintiff	§
VERSUS	§
	§
The TITAN 2, her engines,	§
tackle, apparel, etc., *in rem*	§
Defendant	§

VERIFICATION

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, a Notary Public, duly commissioned and qualified in and for the Parish and State aforesaid, personally came and appeared:

JEAN HUDELOT

being first duly sworn, did depose and say:

That he is the Vice President of Operations for S.H.R.M. Catering Services, Inc. and as such is personally familiar with the facts and allegations contained in the Complaint to Enforce Maritime Lien against the TITAN 2, *in rem*.

That he has read the Complaint and, upon information and belief, all of the allegations contained in that Complaint concerning the services provided to the TITAN 2 and the status

and the balance of the invoices due and owing to S.H.R.M. Catering Services, Inc. for providing said services are true and correct.

S.H.R.M. Catering Services, Inc.

/S/

JEAN HUDELOT
Vice President of Operations

Sworn to and subscribed
before me, this 20th day of
April, 1995.

/S/

NOTARY PUBLIC

/105881

11(a)

Lloyd's World Shipowning Groups

October 1995

Group	Nationality	Ships	Tonnage
China Ocean Shipping Group	CHR	725	12,351,212
China P.R. (Govt.)	CHR	1,993	7,919,776
India (Govt.)	IND	461	3,994,304
Saudi Aramco	SAU	72	3,473,521
Petrobras	BRZ	93	3,286,551
Black Sea Shipping	UKE	275	2,999,852
Novorossiysk Shipping	RUS	138	2,854,944
Sovcomflot	RUS	82	2,193,537
China Merchants	CHR	66	1,979,836
Shanghai Haixing Shipping	CHR	132	1,864,000
Polish Steamship	POL	107	1,856,039
OMI	USA	48	1,765,134
CMB	BLG	41	1,689,620

MOTION FILED
APR 25 1996

(3)

NO. 95-1566

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CRANE VESSEL TITAN 5, *in rem*, and its Claimant, FAR EASTERN MARINE EXPLORATION DRILLING COMPANY,

Petitioners,

v.

OIL SERVICES AND TRADING, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITIONERS

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75PP

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Movant, The Maritime Law Association of the United States (hereinafter "MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by the Crane Vessel TITAN 5 and its Claimant, Far Eastern Marine Exploration Drilling Company (collectively "Petitioners"). Petitioners have given consent to the MLA to file an *amicus* brief. Respondents Oil Services and Trading, Inc., Entron, Ltd., Entron Offshore (A.P.) Pte., Ltd., Double Eagle Marine, Inc., Inland Marine Service, Inc., Ocean Marine Contractors, Inc., L&L Oil Company, Inc., Seabulk Offshore, Ltd., Versabar, Inc., Coral Marine Services, Inc., Shannon Hardware Co., Ltd., Taylor Industrial Specialties, Inc., Central Boat Rentals, Inc., Patterson Marine, Inc., Associated Welding Supply, Inc., Bridon Elms, Inc. and King Trucking, Inc. have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2(b) of the Court.

NATURE OF MOVANT'S INTEREST

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests — ship owners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants. The MLA has filed *amicus* briefs in a number

of cases in this Court involving questions of maritime law and practice.[1]

This case concerns the meaning and interpretation of § 1605(b) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (hereinafter "FSIA"). The MLA participated in the drafting of the maritime provisions of the FSIA as initially enacted in 1976, including specifically § 1605(b), the section at issue in this case. The 1988 amendments to the Act are maritime provisions and include revisions to § 1605(b) and the addition of §§ 1605(c), 1605(d), and 1610(e). All of these amendments were initially drafted by an MLA Committee. In addition representatives of the MLA testified in support of the FSIA both at the time of its initial enactment and in connection with the amendments that were enacted in 1988. *Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2nd Sess. 91-99 (1976) (statement of Michael Marks Cohen, Chairman, MLA Comm. on Maritime Legislation); *Arbitral Awards, Hearings on H.R. 3106, 3137, 4342 and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary,* 99th Cong., 2nd Sess. 142-160 (1986) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA); *Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689 and 1888 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary,* 100th Cong., 1st Sess. 144-163 (1987) (statement

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[1] *E.g. Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER,* _____ U.S. _____, 115 S.Ct. 2322 (1995); *Jerome B. Grumart, Inc. v. Great Lakes Dredge & Dock Co.,* _____ U.S. _____, 115 S.Ct. 1043 (1995); *McDermott, Inc. v. Air Clyde and River Don Castings Ltd.,* _____ U.S. _____, 114 S.Ct. 1461 (1994). For a listing of other cases, see The MLA Report, Doc. No. 671 at 8862-63 (1987).

of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

The MLA is seeking to file an *amicus* brief because the decision of the Court below seriously misconstrues the intent, purpose, and meaning of § 1605 of the FSIA. As a party which participated in the long series of discussions and drafting that led to the adoption of the Act in 1976, and which drafted the amendments to the Act in 1988, the Association is well aware of the impact that the incorrect reading of the Act by the court below will have on maritime commerce and this country's relations with foreign states whose vessels call at United States ports. As drafter and supporter of key maritime provisions of the Act that were interpreted by the court below, the MLA is uniquely situated to show the error of the decision below, the serious effect such a decision will have on vessels owned by foreign states calling in this country, and the adverse diplomatic consequences that will result.

The MLA therefore respectfully moves for leave to file its brief herein.

DATED April 24, 1996

Respectfully Submitted,

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Attorney for The Maritime Law Association of the United States, Movant for Leave to File Brief as Amicus Curiae

QUESTION OF LAW PRESENTED

Does § 1605(b) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, permit a maritime lien claimant to arrest, and bring an *in rem* action against, a vessel owned by a foreign state?

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Miscellaneous Authorities:

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari filed by the Crane Vessel TITAN 5 and its Claimant, Far Eastern Marine Exploration Drilling Company ("Petitioners").

INTEREST OF *AMICUS CURIAE*

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests — ship owners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its

97 years of existence, including the Carriage of Goods by Sea Act,[1] the Federal Arbitration Act,[2] and, more pertinently, the Foreign Sovereign Immunities Act.[3] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[4]

The MLA also participates in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL"), and trade and development ("UNCTAD"), and works closely with the International Maritime Organization ("IMO"). The MLA also actively participates as one of some fifty-five national maritime law associations constituting the Comité Maritime International in a movement to achieve maximum international uniformity in maritime law through the medium of international conventions.

The MLA has filed *amicus* briefs in a number of cases, including briefs accepted by this Court.[5] It is the policy of the MLA to participate as *amicus curiae* only when important issues of maritime law or practice are involved and only when the effect of the Court's decision may be substantial. The By-laws of the MLA require that its participation as *amicus curiae* must be approved by the President, in consultation with the First and Second Vice-Presidents, and then submitted to the Board of Directors. The By-laws

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[1]46 U.S.C. §§ 1300-1315.

[2]9 U.S.C. §§ 1-5.

[3]28 U.S.C. §§ 1330, 1602-1611 (hereinafter "FSIA").

[4]E.g. Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention on the International Regulations for Preventing Collisions at Sea, 28 U.S.T. 3459, as amended, T.I.A.S. 10672, Oct. 20, 1972, reprinted in *6 Benedict on Admiralty*, Doc. No. 3-4 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 1996); see 33 C.F.R. Ch. 1, Subch. D, Special Note, at 176 (1995); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[5]See Note 1 in Motion for Leave, *supra*.

provide that such approval must be given sparingly and only when certain criteria are met. One of the criteria set forth in the By-laws is, "Whether or not the outcome of the litigation would affect the meaning of a law or treaty advanced by the Association." By-laws of The Maritime Law Association of the United States, § 702.3(d).

This case concerns the meaning and interpretation of § 1605(b) of the FSIA. The MLA participated in the drafting of the maritime provisions of the FSIA as initially enacted in 1976, including specifically § 1605(b), the section at issue in this case. The 1988 amendments to the Act are maritime provisions and include revisions to § 1605(b) and the addition of §§ 1605(c), 1605(d), and 1610(e). All of these amendments were initially drafted by an MLA Committee. In addition representatives of the MLA testified in support of the FSIA both at the time of its initial enactment and in connection with the amendments that were enacted in 1988.[6] Accordingly, the provisions of the FSIA that are at issue in this case fall directly within the criteria set forth in its By-laws because the outcome of the litigation does affect the meaning of provisions in a statute that were drafted and advanced by the Association. As one

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[6]*Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 91-99 (1976) (statement of Michael Marks Cohen, Chairman, MLA Comm. on Maritime Legislation); *Arbitral Awards, Hearings on H.R. 3106, 3137, 4342 and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2nd Sess. 142-160 (1986) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA); *Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689 and 1888 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 144-163 (1987) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

of the parties that actively participated in the drafting, support, and enactment of the FSIA, the MLA has an interest in seeing that the Act is properly read and interpreted according to its intent and purposes.

SUMMARY OF ARGUMENT

The decision of the court below opens the door to the very types of diplomatic controversies and tensions that Congress, at the urging of the Executive, through the Departments of State and Justice, and supported by the MLA and the American Bar Association, sought to avoid by passage of the FSIA. As a result of the decision vessels owned by a foreign state are now subject to *in rem* arrest in the Fifth Circuit, and perhaps other Circuits as well, in contravention of the clear meaning and intent of the FSIA. Much of the shipping that calls daily at U.S. ports is owned by foreign states. Accordingly, the decision below will adversely affect a large number of vessels and create the very type of diplomatic tension that Congress and the State Department sought to avoid.

The decision of the court below misinterprets the language of the FSIA, ignores its legislative history, and is in conflict with learned commentary on the Act and all but one of the cases on the issue. If allowed to stand, the decision could also affect the interpretation of the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (hereinafter "Suits in Admiralty Act") because the pertinent language of § 1605 of the FSIA is based on similar language in the Suits in Admiralty Act.

An important federal statute, one that impacts on our relations with foreign sovereigns, has been badly misconstrued. The adverse impact of this decision will be significant. This Court should act now to correct the error.

ARGUMENT

I. THE DECISION OF THE COURT BELOW WILL ADVERSELY AFFECT DIPLOMATIC RELATIONS AND THWARTS THE INTENT OF CONGRESS AND THE EXECUTIVE BRANCH

By holding that §1605(b) of the FSIA permits the arrest of, and an *in rem* action against, a vessel owned by a foreign state, the Court of Appeals for the Fifth Circuit has seriously misinterpreted the Act. In so ruling, the court has ignored the language of the FSIA, the clear legislative history, and the weight of authority construing the pertinent provisions of the Act. Although unpublished, under the rules of Court of Appeals for the Fifth Circuit the decision may be cited and used as precedent.[7] It is binding on Courts in the Fifth Circuit. A number of America's most important ports lie in the Fifth Circuit, e.g., New Orleans, Lake Charles, Ports of South Louisiana, Plaquemine, St. Bernard, Houston, Galveston, Corpus Christi, Beaumont, Gulfport, and Baton Rouge. The Mississippi River ports of Plaquemine, St. Bernard, New Orleans, South Louisiana and Baton Rouge, if treated as one port, would be the largest in the United States in terms of tonnage. In terms of grain tonnage they would be the world's largest. All ships owned by foreign states

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[7]Local Rule 47.5.3 of the Fifth Circuit Court of Appeals states: *Unpublished Opinions Issued Before January 1, 1996.* Unpublished opinions issued before January 1, 1996 are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). If such an unpublished opinion is cited in a brief, motion or other document being submitted to the court, a copy shall be attached to each copy of the brief, motion or document.

are now potential subjects of arrest and seizure in those ports.[8] The impact is not limited to those ports. The maritime bar is a small bar and news of developments in maritime practice travels fast. There is little doubt that one of the effects of this decision is that foreign state-owned vessels in other ports will be subject to arrest and seizure. The impact will be substantial. Many of the vessels of the world's commercial fleet are owned by foreign states. Two of the largest commercial fleets in the world, the Russian and the mainland Chinese, are state owned. So too are the fleets of most third-world and former communist bloc nations. Significant numbers of these state-owned vessels which call daily at United States ports may now be subject to potential prejudgment arrest and *in rem* actions.

This is precisely the type of situation which so concerned the State Department and was an important factor in its espousal of the FSIA, including the provision that would prohibit the arrest of foreign state-owned vessels. Prior to its passage, Mr. Mark Feldman, the Deputy Legal Adviser of the Department of State charged with coordinating the sovereign immunity legislation for the Legal Adviser, addressed a meeting of the MLA on May 3, 1974. In his remarks he stressed the concern of the State Department over the arrest of vessels owned by foreign sovereigns. He noted that to carve an exception in the proposed FSIA to permit all traditional admiralty remedies, including prejudgment arrest and attachment, would "...make it very difficult for the State Department to withdraw from decision making in a significant number of cases." MLA Proceedings, May 3, 1974, Doc. No. 583, p. 6295. He went on to note that "...admiralty cases involve a substantial percentage of sovereign immunity cases brought to the State Department by foreign governments." *Id.*

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[8]Former Soviet bloc countries, most of whose ships are state-owned, are frequent purchasers of grain, and their ships frequently call at these ports.

Testimony at hearings on the proposed FSIA also show the concern of the State Department over the diplomatic problems caused by prejudgment seizure of property owned by foreign sovereigns.[9] It should be remembered that one of the main reasons behind the adoption of the FSIA was to remove the State Department from the process of determining when sovereign immunity existed,, with its attendant diplomatic problems. H.R. Rep. No. 823, 100th Cong., 2nd Sess., 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4511; H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-6606 The decision below thwarts that purpose and the goal sought by the State Department and the Executive Branch.[10]

II. THE DECISION OF THE COURT BELOW IS WRONG

A. THE DECISION BELOW MISINTERPRETS THE PLAIN LANGUAGE OF § 1605(b) OF THE FSIA

In holding that § 1605(b) FSIA permits *in rem* actions against vessels owned by foreign sovereigns, the Fifth Circuit has disregarded the language of Section 1609 of the Act. That Section provides

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this Chapter.

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[9] *Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 26, 28 (1976) (statement of Monroe Leigh, Legal Adviser to the Department of State); *Id.* at 97 (statement of Michael Marks Cohen, Chairman, MLA Comm. on Maritime Legislation).

[10] The Court may want to solicit the current views of the United States.

28 U.S.C. § 1609. Section 1610 provides for arrest of a vessel only in connection with the foreclosure of a preferred ship mortgage. It also permits prejudgment attachment if the foreign state has explicitly waived immunity from attachment prior to judgment *and* the purpose of the attachment is to secure satisfaction of the judgment as opposed to obtaining jurisdiction. 28 U.S.C. § 1610. Neither of these exceptions is applicable to this case. There is no suggestion that the foreign sovereign involved has explicitly waived its immunity, and the case does not involve a preferred ship mortgage. Thus, the language of the FSIA prohibits arrest of the TITAN 5 in this case.

In holding that § 1605(b) of the FSIA permits actions *in rem*, the court below indicated that the specific provisions of § 1605(b) took precedence over the general provisions of §§ 1609 and 1610. It is submitted that the court stands this argument on its head. There is nothing in § 1605(b) that specifically permits arrest of, or an *in rem* action against, a vessel. On the other hand § 1609 explicitly forbids arrest of property owned by a foreign sovereign which would, of course, include a vessel. If anything, § 1609 is the specific provision.

More importantly, it is clear that the court below has misread the clear meaning of § 1605(b). That section provides only that a *foreign state* shall not be immune from the jurisdiction of the Courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien on a vessel or cargo of the foreign state. The section does *not* state that a vessel owned by the foreign state loses its immunity. In essence, the section contemplates an action against a foreign state, which is, by definition, only an *in personam* action. This is reinforced by the jurisdictional grant contained in the FSIA which provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action *against a foreign state* as defined in section 1603(a)

> of this title *as to any claim for relief in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement. (Emphasis added).

28 U.S.C. § 1330(a).

A suit against a vessel can only be by way of an *in rem* action where the vessel is the named defendant.[11] Because § 1605(b) does not state that a vessel owned by a foreign state loses its immunity from suit, no *in rem* action or arrest of the vessel is permitted by § 1605(b).

What is contemplated and permitted by § 1605(b), assuming all its requirements are met, is that in such an *in personam* suit, a cause of action to enforce a maritime lien against a vessel (or cargo) of the foreign state may be asserted. While the action itself is an *in personam* action against the foreign state, not an *in rem* action, the case proceeds under the principles of law of an *in rem* suit. In other words, the case is a form of substitute *in rem* suit.

Such a substitute *in rem* suit is not unique to the FSIA. The Suits in Admiralty Act also provides for just such a substitute *in rem* case. Similar to the FSIA, § 741 of the Suits in Admiralty Act prohibits the arrest of U.S. owned vessels. However § 743 of the Act goes on to state:

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.... If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained....

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[11]2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 478-479 (2d Ed. 1994).

46 U.S.C. § 743. This language provides for a substitute *in rem* action against the United States, while not allowing its vessels to be sued and arrested. The language is almost identical to that of § 1605(c) of the FSIA which provides in pertinent part:

> Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained....

28 U.S.C. § 1605(c). This similarity between the FSIA and the Suits in Admiralty Act is not accidental. The legislative history of the FSIA shows that §§ 1605(b) and (c) were modeled after the Suits in Admiralty Act. See *Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689, and 1888 Before the Subcommittee on Admin. Law and Governmental Relations of the House Committee on the Judiciary*, 100th Cong., 1st Sess. 146, 160-161 (1987) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

The reason for having a substitute *in rem* action, i.e., an *in personam* action that proceeds on the principles of an *in rem* case, stems from the fact that, under maritime law, a vessel owner is not necessarily liable for all maritime liens that may arise against the vessel in an ordinary *in personam* action. 2 Schoenbaum, *supra* at 479; Alex T. Howard, Jr., *Personification of the Vessel: Fact or Fiction?* 21 J. Mar. Law and Comm. 319 (1990). For instance, a collision caused by the negligence of a compulsory pilot gives rise to a maritime lien and *in rem* liability against the offending vessel, but not to *in personam* liability of the vessel owner. *The China*, 74 U.S. (7 Wall.) 53 (1868). Similarly, an owner is not liable *in personam* for a maritime lien against a vessel for damage caused by the master or crew while the vessel is under bareboat charter. *The Barnstable*, 181 U.S. 464 (1901). Nor is the owner personally liable

for supply liens that arise as a result of supplies ordered by a charterer. *Belcher Co. v. M/V MARATH MARINER*, 724 F.2d 1161 (5th Cir. 1984). Thus, where no arrest of a vessel or *in rem* action is allowed, a form of substitute *in rem* action against the owner is necessary in order that these types of maritime claims can be enforced. This is what is provided in both the Suits in Admiralty Act[12] and the FSIA.

B. THE DECISION BELOW IS INCONSISTENT WITH OTHER PROVISIONS OF THE FSIA

A full reading of the entire Act also shows the error of the Fifth Circuit decision. If § 1605(b) authorizes *in rem* actions, the language of § 1605(c), which indicates that a § 1605(b) suit is to proceed according to the principles of laws and rules of practice of suits *in rem* would be mere surplusage. The language of § 1605(c) limiting judgment against a foreign state to an amount not greater than the value of the vessel or the cargo upon which the maritime lien arose would also be unnecessary. If a suit is *in rem* against a vessel, there is no judgment against a foreign state, but only against the vessel and any such judgment is necessarily limited to the vessel's value. Similarly, § 1610(e) specifically provides that

> The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

28 U.S.C. § 1610(e). There would be no need for this language if § 1605(b) permitted *in rem* suits. When Congress wished to permit *in rem* suits against vessels, as it did for enforcement of preferred ship mortgage liens in § 1610(e), it said so in explicit terms.

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[12]See *1 Benedict on Admiralty § 131, pp. 8-67 to 8-68 (Steven F. Friedell, ed., 7th ed. rev. 1996).*

C. THE DECISION BELOW IGNORES THE LEGISLATIVE HISTORY OF THE FSIA

The legislative history of the FSIA makes it abundantly clear that, except for foreclosure of preferred mortgage liens, no *in rem* action or arrest of a vessel owned by a foreign sovereign is permitted by the Act. At the time of the initial adoption of the legislation, the section-by-section analysis of § 1605(b) in the House Report on the measure states:

> The purpose of this subsection is to permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C. 741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit....

H.R. Rep. No. 1487, *supra* at 1976 U.S.C.C.A.N. 6620. The House Report also indicates that:

> Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Id. at 6610.

The 1988 amendments to the FSIA dealt exclusively with its maritime provisions and were drafted by a committee of the Maritime Law Association. The three amendments proposed by the MLA (1) reduced the severity of the penalties imposed upon a litigant who arrests a vessel with knowledge that it was owned by a foreign state; (2) permitted *in rem* suits against, and arrest of, foreign state-owned vessels to enforce a preferred ship mortgage lien; and (3) added language nearly identical to that contained in the Suits in Admiralty Act to make it clear that § 1605(b), although an

in personam suit, would proceed as a substitute *in rem* suit similar to that provided in the Suits in Admiralty Act. H.R. Rep. 823, *supra* at 1988 U.S.C.C.A.N. 4511-4512. In referring to these changes, William R. Dorsey, III, Chairman of the MLA's Ad Hoc Committee to Amend the Foreign Sovereign Immunities Act, testified in support of the amendments as follows:

> With the adoption of the Foreign Sovereign Immunities Act, the right to commence an *in rem* proceeding by arrest of a vessel or cargo owned by a foreign state was eliminated. Instead, § 1605(b) of the FSIA provides that an action to enforce a maritime lien against a vessel or cargo of a foreign state, which lien is based upon the commercial activity of that foreign state, is commenced by giving notice of the suit to the person having possession of the vessel and by giving notice to the foreign state as provided in § 1608. It is clear that an action under § 1605(b) was to be a substitute for the maritime *in rem* action. No arrest of the vessel was permitted, and once the notice prescribed was given, the action was to proceed as an *in personam* action against the foreign state, but to enforce the maritime lien.

Foreign Sovereign Immunities Act, Hearings on H.R. 1149, 1689 and 1888 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 152 (1987) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA). In referring to the proposed amendments that added the language taken from the Suits in Admiralty Act, he further testified that,

> In light of the significant distinction between *in rem* and *in personam* claims, it is important to make clear that Section 1605(b) cases are substitute *in rem* cases.... The Suits in Admiralty Act, 46 U.S.C. § 741-752, provides for a form of *in rem* action against the U.S. Government, while

> forbidding the arrest of the vessel or cargo. Language from this Act (46 U.S.C. § 743) has been adopted in H.R. 1149 as part of the proposed recommended amendment to § 1605 of the FSIA.

Id. at 160-161. He went on to indicate that one of the purposes of the 1988 amendments was to make it clear that §1605(b) was intended to be "...a substitute for an *in rem* proceeding" and "...to confirm Congressional intent that actions under § 1605(b) are substitute *in rem* actions, analogous to cases under the Suits in Admiralty Act, U.S.C. §§ 741-752." *Id.* at 146, 161-162.[13]

Apart from the testimony in support of the 1988 amendments, the mere fact of the amendments shows that no arrest *in rem* is permitted by the FSIA. There would have been no need to amend the FSIA to allow arrest of vessels in connection with foreclosure of preferred ship mortgages if the Act already permitted arrest for enforcement of maritime liens. Similarly, the amendment to reduce the penalty for arresting a vessel with knowledge that it was owned by a foreign sovereign from loss of claim[14] to damages for detention would obviously not have been necessary if the FSIA permitted arrest as held by the court below.

D. THE DECISION BELOW IGNORES THE WEIGHT OF AUTHORITY OF REPORTED CASE LAW AND LEARNED COMMENTARY ON THE FSIA

As noted in the Petition for Certiorari, all of the cases on this question, except one, have correctly held that the FSIA does not

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[13]See also *Arbitral Awards, Hearings on H.R. 3106, 3137, 4345 and 4592 Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary*, 99th Cong. 2nd Sess. 143, 152, 157, 158 (1986) (statement of William R. Dorsey, III, Chairman, MLA Comm. to Amend the FSIA).

[14]As had been held in *Jet Line Services, Inc. v. M/V MARSA EL HARIGA*, 462 F.Supp. 1165 (D.Md. 1978).

permit *in rem* suits and arrest of foreign state-owned vessels in connection therewith. Petition p. 13-14. In addition, the current leading treatise on maritime law states, "The FSIA precludes process *in rem* and admiralty attachment." 2 Schoenbaum, *supra* at 459. See also *1 Benedict on Admiralty* § 130, p. 8-60 (Steven F. Friedell, ed., 7th ed. rev. 1996); A. N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 Tul.L.Rev. 1274, 1314 (1983).

The decision of the court below ignores the nearly unanimous case law and the leading treatises on maritime law.

III. THE DECISION BELOW CASTS A CLOUD ON INTERPRETATION OF THE SUITS IN ADMIRALTY ACT

If the Fifth Circuit's interpretation of the FSIA is allowed to stand, it can be argued that the similar language in § 743 of the Suits in Admiralty Act authorizes *in rem* suits and arrest of U.S. owned vessels under Supplemental Admiralty Rule C. The Court should grant certiorari in order to correct the interpretation of an important federal statute, the FSIA, but also to remove the cloud that the court below's decision casts on the Suits in Admiralty Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED April 24, 1996

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